United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7559

76-7559

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL A. GRIPPE,

Plaintiff-Appellant,

v.

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, AND THE COUNTY OF NASSAU, NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

JOINT APPENDIX

Sutter, Moffatt, Yannelli & Zevin, P.C.
Attorneys for Plaintiff-Appellant
JAMES R. MOFFATT, ESQ.
33 Willis Avenue
Mineola, New York 11501

(516) 747-5800

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DANIEL A. GRIPPE,

Plaintiff-Appellant,

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, AND THE COUNTY OF NASSAU, NEW YORK,

Defendants-Appellees.

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DOCKET NUMBER 76-7559

STIPULATION RE:
CONTENTS OF JOINT APPENDI

IT IS HEREBY STIPULATED by and between counsel for the above parties that the joint appendix contains all the necessary parts of the record to be considered on appeal.

Dated: January 18, 1977
Mineola, New York

JAMES R. MOFFATT, ESQ.
Attorney for Plaintiff-Appellant
33 Willis Avenue
Mineola, New York 11501

HON. WILLIAM GITELMAN
County Attorney, Nassau County

BY_____
WILLIAM NORDEN
Deputy County Attorney
Attorney for Defendants-Appellees
1 West Street
Mineola, New York 11501

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

Plaintiff,

- against - 76 C 1344

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, AND THE COUNTY OF NASSAU, NEW YORK,

Defendant.

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INDEX TO RECORD ON APPEAL

Date	Filings - Proceedings	Page
7/19/76	Complaint filed. Summons issued.	1 cg
7/22/76	Summons returned and filed/executed.	2
8/10/76	Notice of Motion returned 8/27/76 for an Order dismissing the Complaint filed with Memorandum of Law.	3/4
8/17/76	Letter dated 8/11/76 from L. Schultz to Judge Pratt filed. By Judge Pratt - Order dated 8/16/76 adjourned of motion from 8/27/76 to 9/3/76 filed on Docket Number 5.	5
10/8/76	Before Judge Pratt - Case called for motion to dismiss. Motion argued and plaintiff submitted affidavit and moved to file an amended complaint. Decision reserved.	
10/21/76	By Judge Pratt - Memorandum and Order dated 10/21/76 dismissing the complaint filed.	6

10/22/76	Judgment that the plaintiff take nothing of the defendants and that defendants motion to dismiss is granted and the complaint is dismissed filed.	7
11/1/76	Notice of entry filed.	8
11/3/76	Notice of appeal filed. Copy mailed to the Court of Appeals.	9
11/15/76	Check for $250.00 in lieu of bond on appeal filed in registry of court.	
11/22/76	Civil appeal scheduling order filed.	10
	Clerk's Certification	11

INDEX TO APPENDIX

	PAGE
Memorandum and Order of the Honorable George C. Pratt.....	A-1 - A-5
Summons.....	A-6
Complaint in United States District Court.....	A-7 - A-35
Exhibit A (Charges and Specifications).....	A-35(a)
Exhibit B (Notice of Disposition).....	A-35(b)
Exhibit C (Appellant's verified petition to New York State Supreme Court for transfer to Appellate Division.	A-36
Exhibit F (Appellant's Article 78 brief).....	A-37
Exhibit D (Appellate Division's Order confirming determination).....	A-37(a)
Exhibit G (Appellant's brief to New York State Court of Appeals).....	A-37(b)
Exhibit E (New York State Court of Appeals decisions).....	A-37(c)
Exhibit H (Appellant's Petition for a Writ of Certiorari to the United States Supreme Court).....	A-37(d)
Appellee's notice of motion to dismiss Appellant's Complaint in United States District Court.....	A-38 - A-39
Appellee's affidavit in support of motion to dismiss.....	A-40 - A-51
Appellee's Exhibit 1 (Recommendation of hearing Officer)....	A-52
Appellee's Exhibit 2 (Police Commissioner's disposition of charges).....	A-53
Appellee's Exhibit 3 (Police Commissioner's determination)..	A-54
Appellee's brief to the United States Supreme Court.....	A-54(a)
Appellant's affidavit in opposition to Appellee's motion to dismiss Complaint in United States District Court	A-55 - A-62
Appellant's notice of appeal.....	A-63

ST./OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	DEMAND OTHER	JUDGE NUMBER	JUR. DEM.	DOCKET YR.	DOCKET NUMBER
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PLAINTIFFS

GRIPPE, DANIEL A.

DANIEL A. GRIPPE

DEFENDANTS

FRANK,LOUIS J., et al

LOUIS J. FARNK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU AND THE COUNTY OF NASSAU , NEW YORK

CAUSE

28 USC 1343(3) action to redress the plntff's deprivation of rights, privileges and immunities secured by the Constitution of the USA by the misuse of the Rules and Regulations of the Police Department of the County of Nassau, etc.
Seeks: $1,500,000.00 and immediate reinstatement to police department

ATTORNEYS

For PLNTFF:
SUTTER, MOFFAT , YANNELLI & ZEVIN, P.C.
33 Willis Avenue
Mineola, NY 11501
516-747-5800

For DEFT:
JAMES CATTERSON
County Atty, County of Nassau, NY

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

RC-111 (Rev. 1/76)

1661

CRIPPE vs FRANK et al

DATE	NR.	PROCEEDINGS
7-19-76		Compaaint filed. Summons issued. (1)
7-22-76		Summons ret and filed/executed. (2)
[illegible]		[illegible] (3)
8-10-76		Notice of motion ret 8-27-76 for an order dismissing the complaint filed with memorandum of law. (3/4)
8-17-76		Letter dtd. 8-11-76 from L. Schultz to Judge Pratt filed. (5)
8-17-76		By PRATT,J.- Order dtd. 8-16-76 adjd of motion from 8-27-76 to 9-3-76 filed on doc.# 5.
10-8-76		Before PRATT,J.- Case called for motion to dismiss. Motion argued and pltff submitted affidavit and amended complaint moved to file an amended complaint. Decision reserved
10-21-76		By PRATT,J-Memo & Order dtd 10-21-76 dismissing the complaint filed. (6)
10-22-76		Judgment that the pltff htake nothing of the defts and that defts' motion to dismiss is granted and the complaint is dismissed filed. (7) (8)
11-1-76		Notice of entry filed.
11-3-76		Notice of appeal filed. Copy mailed to the C of A. (9)
11-[illegible]-76		Check for $250.00 in lieu of bond on appeal filed. in registry of court (10)
11-22-76		Civil appeal acheduling order filed.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

DANIEL A. GRIPPE,

Plaintiff, DOCKET NO. 76 C 1344

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, AND THE COUNTY OF NASSAU, NEW YORK, MEMORANDUM AND ORDER

Defendants.

- x

PRATT, J.

Invoking 28 USC §1343(3) and 42 USC §1983, Daniel Grippe asks this court for monetary and injunctive relief to remedy his allegedly unconstitutional dismissal by the Nassau County police force. Defendants, who are the former and present Nassau County police commissioners, the Nassau County police department, and the County of Nassau, have made a motion to dismiss Grippe's complaint pursuant to FRCP 12(b). Since, as explained below, the complaint fails to state a claim upon which relief can be granted, defendants' motion is granted.

According to the complaint, Grippe was formerly a

sergeant in the Nassau County police department (the Department). On September 13, 1973, he was charged with two violations of the Department's regulations: acting in a manner unbecoming an officer by committing adultery and making a "false communication" in a report. A hearing was promptly held, and the presiding "Trial Commissioner", one of the Department's deputy chief inspectors, concluded that Grippe was guilty of both charges. Upon his recommendation, the Nassau County police commissioner dismissed Grippe from the Department in October of 1973.

Seeking declaratory, injunctive, and monetary relief, plaintiff instituted in the New York State Supreme Court, an Article 78 proceeding which pursuant to CPLR §7804(g), was transferred to the Appellate Division, Second Department.

In that proceeding the plaintiff advanced either in his petition or his brief to the Appellate Division, Second Department, or both, the same constitutional claimswhich he now urges as the basis for this §1983 action: (1) right to confrontation of witnesses (2) privileges against self-incrimination, (3) right to counsel, (4) right to privacy, (5) due process, and (6) equal protection. See Complaint, Exhibits C and F.

In November of 1974, the Appellate Division unanimously dismissed Grippe's Article 78 proceeding "on the merits", but without opinion. Such a dismissal necessarily rejected each of Grippe's constitutional claims. His attempts to obtain review in both the New York Court of Appeals and the United States Supreme Court were unsuccessful.

Now relying upon 28 USC §1343(3) and 42 USC §1983, Grippe's complaint to this court repeats the factual allegations and constitutional arguments asserted in his Article 78 petition and his brief to the Appellate Division.

In Lombard v. Board of Education of the City of New York, 502 F2d 631, 637 (CA2 1974), cert. denied, 420 US 976 (1975), also a §1983 action, the Second Circuit has stated:

> Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding * * *, the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F2d 339 (2 Cir. 1974).

Accord, Hanzimanolis v. Codd, 404 F Supp 719 (SDNY 1975). While in Lombard the plaintiff had not raised any constitutional issue in earlier Article 78 proceedings, here Grippe has, and he has done so in a meaningful manner.

Newman v. Board of Education of the City School

District of New York, 508 F2d 277 (CA2), cert. denied, 420 US 1004 (1975), presented a different situation, since the plaintiff's twelve-page Article 78 petition there had made only one conclusory reference to the due process claim underlying her §1983 suit. Here, however, as in Montagna v. O'Hagan, 402 F Supp 178 (EDNY 1975), the constitutional issues which plaintiff seeks to raise figured prominently both in his Article 78 petition and the accompanying brief.

Plaintiff may not use §1983 to relitigate constitutional claims which, by his own election, he has already litigated in a state court. Lombard v. Board of Education of the City of New York, supra; Thistlethwaite v. City of New York, 497 F2d 339 (CA2 1974), cert. denied, 419 US 1093 (1974); Taylor v. New York City Transit Authority, 433 F2d 665 (CA2 1970); Hanzimanolis v. Codd, supra; Montagna v. O'Hagan, supra.

The cases cited by plaintiff's counsel do not support plaintiff's position. In Rose v. Bronstein, 389 F Supp 1328 (SDNY 1976), although plaintiff had exhausted her administrative remedies, she did not seek relief in the state courts prior to commencing her federal action. Similarly in Velger v. Cawley, 525 F2d 334 (CA2 1975), the plaintiff did not seek relief in state courts, but instead went directly to

federal court.

Accordingly, defendant's motion is granted and the complaint is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
October 21, 1976

GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

76C 1344

DANIEL A. GRIPPE,

Plaintiff,

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU AND THE COUNTY OF NASSAU, NEW YORK,

Defendants.

----------X

SUMMONS

CIVIL ACTION NO.

To the above named Defendants:

You are hereby summoned and required to serve upon plaintiff's attorneys, SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C., whose address is 33 Willis Avenue, Mineola, New York, 11501, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment shall be taken by default against each defendant for the relief demanded in the complaint.

LEWIS ORGEL, CLERK

By: MARY ANN GIUSTI
Deputy Clerk

Dated: JULY 19, 1976

NOTE: THIS SUMMONS IS ISSUED PURSUANT TO RULE ~~OF THE FEDERAL~~ RULES OF CIVIL PROCEDURE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

Plaintiff,

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU AND THE COUNTY OF NASSAU, NEW YORK,

Defendants.
----------X

COMPLAINT

CIVIL ACTION NO. _____

760 1344

1. That at all times hereinafter mentioned plaintiff was and is a citizen and resident of the County of Nassau, State of New York.

2. That the jurisdiction of this court over this action is invoked under Title 28, United States Code, Section 1343(3) to redress the plaintiff's deprivation of rights, privileges and immunities secured by the Constitution of the United States of America by the misuse of the Rules and Regulations of the Police Department of the County of Nassau, the Civil Service Law of the State of New York, the Nassau County Statute known as the County Government Law of Nassau County (Nassau County Administrative Code), the Penal Law of

the State of New York, the Criminal Procedure Law of the State of New York, all of which misuse and abuse of said foregoing statutes denied the plaintiff his equal rights heretofore enjoyed and to be enjoyed by citizens similarly situated and the jurisdiction of this court is further invoked under subparagraph (4) of Title 28, Section 1343 to recover damages and to secure equitable and such further relief to protect and restore his civil rights by an act of Congress to wit: Title 42, United States Code, Section 1983 for the deprivation of the plaintiff's rights all as aforesaid and as hereinafter enumerated and for the relief hereinafter plead for and sought.

PARTIES

3. That as heretofore alleged the plaintiff was and is a citizen and resident of the County of Nassau in the State of New York.

4. That all all times hereinafter mentioned Louis J. Frank at the time of the plaintiff's departmental trial and hearing and said defendant's order dismissing the plaintiff as hereinafter complained of was the duly appointed and acting Commissioner of Police of the County of Nassau and the State of New York.

5. That at all times hereinafter mentioned Daniel P. Guido is the present duly appointed and acting Commissioner of Police of the County of Nassau and is the successor to said office by virtue of his appointment, and the retirement of the said defendant Louis J. Frank.

6. That the defendant the Police Department of the County of Nassau is an agency, and agent of the defendant the County of Nassau, a municipal corporation, by virtue of the statutory provisions of the State of New York, and acting pursuant to the police power delegated to it by the Federal Constitution of the United States of America and the State Constitution of the State of New York.

7. That the County of Nassau, State of New York is a party defendant, upon information and belief, by virtue of their contractual relations with and on behalf of members of the Police Department of the County of Nassau, State of New York, and the said contractual relationship with the Patrolmen's Benevolent Association and the Superior Officer's Association, with the said defendant the County of Nassau; that the said defendant the County of Nassau is otherwise named as a defendant by virtue of the fact that it was and is the employer and municipal authority responsible for each and every act and

determination of the other defendants in this action, as its agents.

FACTS

8. That heretofore the plaintiff on the 1st day of September, 1959 was duly appointed a Patrolman with the Police Department of the County of Nassau pursuant to the Civil Service Law and rules of the County of Nassau, the Civil Service Laws of the State of New York and the rules and regulations of the Police Department of the County of Nassau.

9. That thereafter, on or about the 29th day of January, 1971 the plaintiff was appointed a Sergeant in the Police Department of the County of Nassau in accordance with the foregoing Laws of Nassau County and the State of New York.

10. That on or about the 13th day of September, 1973 plaintiff was suspended from his duties and details as a Sergeant and Police Officer in the Police Department of the County of Nassau and thereafter continued under suspension until October 22, 1973 at which time the plaintiff was dismissed from his positions aforesaid and his name stricken from the rolls from said Police Department; that at the time of such suspension and dismissal, the plaintiff was a Civil Service employee of the State of New York.

11. That on or about the 13th day of September, 1973 Deputy Chief Inspector Vincent J. Redican of the Nassau County Police Department preferred charges against the petitioner for violating certain rules and regulations of the Police Department of the County of Nassau, and a copy of said written charges and specifications dated September 13, 1973 is attached hereto and marked exhibit A.

12. That upon information and belief, Deputy Chief Inspector Frank E. Klecak was duly designated Trial Commissioner to conduct the hearings on said charges in accordance with the rules and regulations of the defendant the Police Department of the County of Nassau and the Nassau County Administrative Code aforesaid.

13. That thereafter a hearing on said charges and specifications was conducted from October 2, 1973 through October 5, 1973.

14. That at the conclusion of said hearing the Trial Commissioner reserved decision.

15. That upon information and belief the Trial Commissioner thereafter allegedly determined and recommended to the Commissioner of Police that petitioner be found guilty on said charge specifications and that he be dismissed from

the police force and his duties as a Nassau County Police Sergeant.

16. That thereafter the Commissioner of Police allegedly adopted and approved said determination and recommendation of the Trial Commissioner made cursory findings of fact and on the 22nd day of October, 1973 caused to be personally delivered to the plaintiff an Order dismissing the petitioner as a Nassau County Police Sergeant, attached hereto and marked exhibit B.

17. That all of the foregoing facts as pled in this complaint are specified and set forth in the duly verified petition brought by the plaintiff in the Supreme Court of the County of Nassau pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York, a copy of which said verified petition is attached hereto and marked exhibit C.

18. That thereafter pursuant to the applicable provisions of the Civil Practice Law and Rules of the State of New York, the plaintiff made application to the Supreme Court of the State of New York for the County of Nassau to review and annull the administrative determination and order which dismissed the plaintiff from his position as a Sergeant and Police Officer in the Police Department of the County of

Nassau; that in accordance with the Civil Practice Law and Rules of the State of New York, the plaintiff's petition for review by means of an Article 78 proceeding as provided for the Civil Practice Law and Rules of the State of New York, was duly transferred to the Appellate Division of the Supreme Court of the State of New York, Second Department by order of the Honorable Manuel W. Levine, Justice of the Supreme Court of the State of New York, Nassau County, by order dated December 12, 1973.

19. That the said Appellate Division of the Supreme Court of the State of New York, Second Department, which under New York State Law had the sole power and discretion to review the constitutional deprivations the plaintiff had suffered as a result of the unfair hearing below, which are nevertheless secured to him by the Constitution of the United States of America, and the acts of Congress of the United States of America heretofore enumerated and to reinstate the plaintiff to his position as a Police Officer, the said Appellate Division of the Supreme Court of the State of New York, Second Department wholly failed to review and consider the unfair hearing below, the deprivation of plaintiff's constitutional rights, the deprivation of his civil rights, the unlawful

invasion of his privacy, the immeasurable damages suffered by him and his family, purportedly in accordance with the Civil Service Law of the Nassau County Administrative Code of the State of New York, unanimously affirmed the determination and order of the defendant Louis J. Frank, the former Commissioner of Police of the County of Nassau which dismissed the plaintiff from his position as a Police Officer and Sergeant in the Police Department of the County of Nassau, without opinion, a copy of which Appellate Division decision and order is attached hereto and marked exhibit D.

20. That thereafter the plaintiff as provided for in accordance with the Civil Practice Law and Rules of the State of New York, duly sought leave to appeal to the highest court of the State of New York to wit: the Court of Appeals of the State of New York to review and reverse the order of the Appellate Division, Second Department aforesaid because of the deprivation of his constitutional rights, the civil rights afforded him by the acts of Congress of the United States of America aforesaid enumerated and for the relief annuling the administrative determination dismissing his as a Police Officer and for his forthwith reinstatement as a Police Officer and Sergeant in the Police Department of the County of Nassau, New York.

21. That the said Court of Appeals exercising its purported discretion as is provided for in the Constitution of the State of New York, the Civil Practice Law and Rules of the State of New York, its own rules and regulations denied the plaintiff's request for leave to appeal from the aforesaid order of the Appellate Division, Second Department to said Court of Appeals on constitutional grounds by order dated the 12th day of February, 1975, exhibit E.

22. That thereafter the plaintiff, still aggrieved as a result of the deprivation of his constitutional rights and civil rights as provided for by the foregoing enumerated acts of Congress of the United States applied to reargue his motion for leave to appeal to the Court of Appeals of the State of New York on all of the grounds set forth in his verified petition brough pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York, his Brief in the Appellate Division, Supreme Court of the State of New York, Second Department attached as exhibit F, his Brief to the Court of Appeals of the State of New York attached as exhibit G, which clearly set forth the deprivation of his constitutional rights secured to him by the Constitution of of the United States of America, the Constitution of the State

of New York and the civil rights secured to him by the statutes of the United States of America heretofore enumerated but said application for reargument before the Court of Appeals of the State of New York was similarly denied without opinion.

23. That thereafter the plaintiff's duly petition to the Supreme Court of the United States of America for the October term 1975 of said court for a petition for Writ of Certiorari to the Court of Appeals of the State of New York, attached as exhibit H, all as is provided for in the Rules of the Supreme Court of the United States of America, the statutes and Constitution of the United States of America, but upon information and belief, the said Supreme Court of the United States of America denied the plaintiff's petition for certiorari but not on the merits as is provided for in Rule 25 of the Supreme Court Rules of the United States of America and the case law decided thereunder; that said Supreme Court of the United States of America, to the contrary, upon information and belief, denied the plaintiff's petition for a Writ of Certiorari on the basis and grounds that each and every issue raised as to the deprivation of the plaintiff's constitutional rights and his civil rights, the equal protect-

ion of the law which was not afforded him, the invasion of his privacy were and are so clearly defined, enumerated by decisional law of the Supreme Court of the United States of America and the statutes of the Congress of the United States of America, the granting of the petitioner's Writ of Certiorari would simply waste the time of the highest court of this country by requiring it to merely reiterate and recite its prior decisional law and construction of the Constitution of the United States of America, and its statutes aforesaid, all of which are clearly and decisively set forth in the decisional case law of the Supreme Court of the United States of America and the District and Appeals Courts of the United States of America.

24. That the plaintiff has exhausted at each and every stage of the proceedings the so-called state remedies afforded to him by the Constitution of the State of New York and the statutes of the State of New York.

25. That his application for Writ of Certiorari to the Supreme Court of the United States of America is not res judicata under federal statute, the Supreme Court Rule 25 of the United States of America and the Rules of this honorable court; that this court's jurisdiction is invoked in accordance

with the foregoing provisions of the United States Code.

AS AND FOR A FIRST CAUSE OF ACTION FOR EQUITABLE RELIEF AND THE SPECIFIC RELIEF RESCINDING, ANNULLING AND CANCELLING THE DEFENDANT, LOUIS J. FRANK'S ORDER AND DETERMINATION THE 22nd DAY OF OCTOBER, 1973 DISMISSING THE PLAINTIFF FROM HIS POSITION AS A POLICE OFFICER AND SERGEANT IN THE POLICE DEPARTMENT IN THE COUNTY OF NASSAU FOR DEPRIVATION OF AND VIOLATION OF THE PLAINTIFF'S FUNDAMENTAL CONSTITUTIONAL RIGHTS TO A FAIR ADMINISTRATIVE HEARING; FOR THE UNEQUAL APPLICATION OF THE LAW TO HIM PURSUANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, SECTION 1, IN THAT, HE WAS NOT AFFORDED EQUAL RIGHTS OF CITIZENS SIMILARLY SITUATED WITHIN THE JURISDICTION OF THE UNITED STATES, THE COUNTY OF NASSAU AND THE STATE OF NEW YORK.

26. That the Constitution of the United States of America, the Constitution of the State of New York, the decisional Federal Law, the decisional State Law of the State of New York mandates and requires that in an administrative hearing the plaintiff who possessed, vested and secured rights under color of state law to wit: the Civil Service Law of the State of New York, the Nassau Government Law of the Nassau Code (Nassau County Administrative Code, Section 8-13-0 thereof) a copy of which is annexed as exhibit I, which

delegates certain powers and authority to the defendant Louis J. Frank as then Commissioner of Police of the County of Nassau, the Rules and Regulations governing the conduct of members of the Police Department of the County of Nassau duly promulagated by him, and his successor, which have the force and effect of statute, mandates and requires that a citizen albeit a Police Officer must be afforded the fundamental right to a fair, impartial hearing, which does not invade his privacy, which does not treat him unequally with regard to citizens simarily situated as Police Officers in the Police Department of the County of Nassau under any color of so-called State, Local law and regulation before his position as a policeman of 14 years can be summarily and predeterminately taken away from him including his reputation, his ability and means to secure thereafter similar gainful employment.

27. That as is alleged in the plaintiff's verified petition brought pursuant to Article 78 of the Civil Practice Law and Rules, attached hereto and marked exhibit C, the charges against the defendant brought by the defendant Louis J. Frank on behalf of the defendant the Police Department of the County of Nassau and the defendant the County of Nassau, the plaintiff was accused of having an extra marital affair

with one Mrs. Hester I. Jerome.

28. That on the 4th day of September, 1973 the said Mrs. Hester I. Jerome complained to the plaintiff's commanding officer one, Inspector Thomas DeBeche, that the plaintiff while married and the father of five children had engaged in intimate relations with her in private which said relationship only took place while the plaintiff was off duty and while such relationship in no way was connected with, effected or concerned the plaintiff's duties as a public servant of the State of New York and as a Police Officer of the State of New York as defined by State statute.

29. That on the 12th day of September 1973 the plaintiff received a direct order from Deputy Chief Inspector Vincent J. Redican, a high ranking Nassau County Police Officer, while the plaintiff was on vacation, to report forthwith to the Chief of District's Office at Police Headquarters at 1492 Franklin Avenue, Mineola, New York.

30. That in accordance with the foregoing direct order the plaintiff in due course responded to the same and reported to the office of the Chief of District as aforesaid at approximately 1:30 p.m. on September 12, 1973.

31. That although the Constitution of the United

States of America, the Constitution of New York State allows, requires and permits a person suspected of having committed a crime to have a lawyer present before being questioned upon the plaintiff's specific request, the plaintiff was not permitted to consult with, confer with or have present any such lawyer before being subjected to massive interrogation by three of the highest ranking police officers of the Nassau County Police Department. This request denied, the presence of a lawyer to represent plaintiff before interrogation although duly and respectfully requested by the plaintiff all of which is duly reflected by the minutes of the administrative hearing which resulted in the order of the defendant Louis J. Frank dismissing the plaintiff from his position as a Police Officer and Sergeant of the County of Nassau on the 22nd day of October, 1973.

32. That under the laws of the State of New York specifically Section 255.17 of the New York State Penal Law, Adultry is a class B misdemeanor and accordingly, the plaintiff's rights to have a lawyer present to represent him before and during interrogation is guaranteed by the Sixth Amendment of the Constitution of the United States.

33. That by virtue of the fact that the plaintiff's alleged activity constituted said crime of Adultry as defined

by New York State statute, the plaintiff had the constitutional right to invoke his Fifth Amendment privileges all of which the plaintiff promptly attempted to exercise as is reflected in the minutes of the Administrative Hearing which resulted in his dismissal and which is reflected in a written report extorted from him under compulsion, that is, if he did not give a full and complete report concerning all of his activities, with one Mrs. Hester I. Jerome, while off duty which were unrelated and unconnected to his position as a Police Officer he would be suspended on the spot. One of the said interrogators to wit: Chief McConnell saying: "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here".

34. That the said plaintiff stated in the said constitutionally, prohibited coerced report among other things that (he) plaintiff:

> "believes that his Constitutional Rights and liberties as a citizen of the United States of America are being violated along with his Natural Rights as a free man. Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department, and under such circumstances will write this report."

35. That notwithstanding timely objection at the Administrative Hearing, where it was clearly proven that the defendant Police Department of the County of Nassau was pre-determined to dismiss him in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, said coerced report (attached as the first exhibit to plaintiff's Article 78 petition; Petitioner's exhibit C), was introduced into evidence and used against him.

36. That subsequent to this coerced report (which was sought to be suppressed) and the so-called verbal declarations of the nominal complainant, Mrs. Hester I. Jerome, the defendant, the Police Department of the County of Nassau filed charges allegedly in accordance with the Nassau County Government Law (Nassau County Administrative Code; Section 8-13-0 thereof; Article 75 of the Civil Service Law of the State of New York) and thus subjected the plaintiff to a hearing based upon the hearsay oral declarations of the said Hester I. Jerome and the constitutionally prohibited coerced report of the plaintiff as aforesaid.

37. That upon the presentation of the department's case, that is, the charges against the plaintiff, a County Attorney of the defendant County of Nassau representing the

defendant, Louis J. Frank as Commissioner of Police and the defendant Police Department of the County of Nassau proceeded under an evidentiary rule known as "shop book rule" to introduce at the very offset of the administrative hearing the plaintiff's constitutionally prohibited coerced so-called report which he was required to write under the threat of immediate suspension which was introduced into evidence over the objection of plaintiff's counsel on the basis of the First, Fourth, Fifth, Sixth and Fourteenth Amendment constitutional rights and privileges, which objections were specifically and timely made, as reflected in the minutes of said hearing.

38. That the balance and remainder of the said defendant's Police Department of Nassau County case consisted of the admission, all as is again reflected in the minutes and transcript of said administrative hearing, of the so-called hearsay statements of the nominal complainant Hester I. Jerome, which hearsay statements were not and are not subject to cross examination and notwithstanding the fundamental guarantee of cross examination, upon cross examination the declarant of these hearsay statements namely, Deputy Chief Inspector Vincent

J. Redican admitted for the first time that this nominal complainant Mrs. Hester I. Jerome sought, begged and pled to withdraw her complaint against the plaintiff and further told Chief Redican that many of her allegations against the plaintiff were exaggerated and were lies.

39. That further, at said proceeding the said nominal complainant Mrs. Hester I. Jerome was not produced although allegedly subpoenaed and the plaintiff and plaintiff's counsel were deprived of the right and opportunity to explore and search for the truth by the tools of cross examination which is the most fundamental guarantee under the color of state law which is to be provided and afforded to a respondent in an administrative hearing.

40. That it was further conceded at said hearing all of which are reflected in its minutes, that the plaintiff was told by the third highest ranking uniformed police official on the defendant Police Department of the County of Nassau, Assistant Chief Inspector William Tredwell who serves in his position under the Civil Service Law of the State of New York at the defendant's Louis J. Frank's discretion and pleasure, his permanent rank being that of a Captain under the Civil Service Law of the State of New York, that unless the plaintiff during his interrogation agreed to resign on a so-called

voluntary basis he would be found guilty of any charges yet to be preferred and dismissed from the force, that is, from his position as a Police Sergeant in the Police Department of the County of Nassau.

41. That such an imperative coercive demand and requirement of the plaintiff that he resign so taints the so-called fair administrative hearing as to render it, insofar as the plaintiff's defense of said charges is concerned a vain exercise of constitutional protestations.

42. That the plaintiff in said administrative proceeding duly brought to the attention of the hearing officer, again a Civil Service employee of the State of New York who enjoyed the permanent rank of Captain and who served as a Deputy Chief Inspector at the whim and discretion of the defendant Louis J. Frank, that the plaintiff in said administrative hearing intended to produce expert testimony that the so-called crime of Adultry as defined by the Penal Law of the State of New York Section 255.17 thereof, did and does not involve a crime of moral turpitude by reason of the fact that its most recent reenactment into the Penal Law of the State of New York was brought about to satisfy certain particular groups which do not represent the mores of present

day society; that the said hearing officer consented and agreed, again which is fully conceded and documented by the stenographic minutes of the administrative hearing, that he would be pay due deference and respect to expert opinion as to whether or not the conduct allegedly indulged in by the plaintiff in this action offended the mores or the conscience of the community of Nassau County and the State of New York as it then existed.

43. That the said plaintiff in this action, the respondent in the administrative hearing duly produced each experts to wit: Doctor John Wildeman, Chairman of Sociology Department, Hofstra University and Professor Meyer Barash, Professor of Sociology, Hofstra University who testified and and were extensively cross examined through at least 153 pages of testimony that the alleged crime of Adultry did not at the time of the plaintiff's alleged commission of it in any way violate the standards of morality of the community of Nassau County and the State of New York; that such statute had not be enforced for over fifty years insofar as any person is concerned regardless of his standing in the community including, but not limited to, the former Governor of the State of New York, the Present Vice President Nelson A. Rockefeller.

44. That accordingly, the imposition of the penality of dismissal upon the plaintiff in this action, the respondent in that administrative proceeding is violative of the equal protection of the law that he must be afforded pursuant to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America.

45. That notwithstanding the fact that the hearing officer namely, Deputy Chief Inspector Frank E. Klecak stated in the administrative hearing which is the subject of this law suit that he would give due consideration to such argument and expert testimony by qualified sociologists he wholly failed and neglected to do so and merely recommended a perfunctory fashion that the plaintiff in this action, the respondent in the administrative hearing, be found guilty of the charges all as specified which is attached to the petition pursuant to Article 78, attached as exhibit C to this complaint.

46. That pursuant to the jurisdiction afforded to this court by the Federal statutes heretofore cited and specifically Title 28, United States Code Section 1343(3), this court is requested to redress the plaintiff's constitutionally deprivations as alleged in this cause of action by rescinding, annulling and cancelling the determination and

order of the defendant Louis J. Frank dated October 22, 1973 which unlawfully and illegally dismissed him from his position as a police officer and Sergeant of the Police Department of the County of Nassau.

AS AND FOR A SECOND CAUSE OF ACTION FOR DAMAGES PURSUANT TO SUBPARAGRAPH (4) OF THE UNITED STATES CODE, SECTION 1983 ENTITLED "CIVIL ACTION FOR DEPRIVATION O[illegible] RIGHTS".

47. That the plaintiff repeats and reiterates each and every allegation of this complaint as though the same were enumerated and set forth at length herein.

48. That at the time of the plaintiff's illegal and unlawful dismissal from his position as a Police Officer and Sergeant in the Police Department of the County of Nassau, that is, the 22nd day of October, 1973, he had certain rights vested to him pursuant to a certain contract between the Patrolman's Benevolent Association of the Police Department of the County of Nassau, Inc. as the plaintiff's bargaining agent.

49. That the plaintiff, pursuant to Section 385 and 385a of the Retirement and Social Security Law of the State of New York was entitled to retire after twenty years of service with fifty percent of his final base pay as determined by

formula between the Nassau County Police Department the defendant the county of Nassau and the New York State Policemen's and Firemen's Retirement System; that the plaintiff at the time of his illegal unlawful discharge in violation of his Civil Rights and Constitutional rights aforesaid was earning the yearly sum of approximately $18,000.00 and in addition thereto was not required to contribute to the New York State Policemen's and Firemen's Retirement System or to pay any portion of his salary which provided medical and dental insurance for himself and the members of his family which consisted of a wife and five children all of which were under the age of nineteen years of age then and now and thus at all times mentioned in this complaint and up to the present time were and are eligible for said medical benefits. That in addition thereto in accordance with the aforesaid contract between the Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc. and the defendant the County of Nassau, the plaintiff was afforded certain guaranteed equipment allowance, paid holidays and night differential benefits which, in sum and substance, at the time of this plaintiff's dismissal from the Police Department of the County of Nassau by the order aforesaid

by the defendant Louis J. Frank amounted minimally to the sum of approximately $1,877.87 per year.

50. That pending the so-called disciplinary charges and hearing against the respondent brought pursuant and under the color of the local and state laws aforesaid enumerated, the plaintiff at the time of his discharge effective October 22, 1973 was completing the requisite courses which were to provide him and did provide him with a Bachelor of Arts degree at Hofstra University, 1000 Fulton Avenue, Hempstead, New York which was granted to him on June 2, 1974.

51. That as a result of the aforesaid constitutional deprivations, the violation of the Civil Rights all as provided for in the Federal statutes and cases thereunder, the plaintiff as a result of said hearing and dismissal from the Police Department of the County of Nassau as a Sergeant, the unconstitutional invasion of his privacy, the deprivation of his constitutional rights and civil rights as aforesaid, his reputation has been permanently impugned, degraded and destroyed to such an extent that he is presently employed as a building superintendent of a building and structure known as 33 Willis

Avenue, Mineola, New York.

52. That no other citizen of the County of Nassau be they lawyers or judges or police officers similarly situated with the plaintiff in this action, especially bearing in mind the present liberal divorce laws of the State of New York have been so blatently deprived of their reputation and ability to obtain a position based upon fidelity and honesty because of the fact that the mores of society in Nassau County and the State of New York involving any profession whether they be police officers, lawyers or judges have not exacted the penalty so imposed upon the plaintiff in this action which was predetermined as aforesaid and which has not been thus so imposed upon any person similarly situated in the history of the Police Department of the County of Nassau.

53. That in this connection the plaintiff in this action, the respondent in the administrative proceeding and his counsel tried to introduce into evidence which was not permitted; that the conduct complained of and alleged of violative of the Administrative Code of Nassau County and the rules and regulations of the defendant Louis J. Frank as Commissioner of Police of Nassau County was not unusual; that said practice is no more uncommon in the personal private

life life of a policeman as it is uncommon in the personal private life of any other members of a profession; that it was rather commonplace.

54. That accordingly, pursuant to the jurisdiction of this court as enumerated in the statute cited, the plaintiff has been damaged based upon his loss of earnings, the deprivation of his right to retire as a matter of law after twenty years of service as a police officer in the pension system of the State of New York, his inability to obtain a position of any nature or kind which involves trust, or fidelity, his inability to support his wife and five children were similarly injured despite his efforts to seek gainful employment as a civil servant in other fields or related fields commensurate with his qualifications, the plaintiff in this action has been damaged and is entitled to be rewarded for the violation of his constitutional rights and civil rights of Americans by the statutes of Congress heretofore enumerated as follows:

Damages in the sum of $118,690.48 which represents $68,690.48 in lost wages and benefits from September 13, 1973, the date plaintiff was suspended without pay, through the date of issuance of the Summons and Complaint and attorney's fees in the sum of $50,000.00 as detailed below.

WAGES

Year	Annual Salary	Period of Time	Wages Lost
1973	$17,719.00	109 days	$5,452.00
1974	$19,349.00	12 months	$19,349.00
1975	$21,106.00	12 months	$21,106.00
1976	$21,106.00	7 months	$12,311.83
TOTAL WAGES LOST.....			$58,218.83

BENEFITS

1974	12 Holidays	$889.61
	Night Differential	$738.26
	Equipment Allowance	$250.00
SUBTOTAL.....		$1,877.87
1975	12 Holidays	$914.00
	Night Differential	$1,282.89
	Equipment Allowance	$300.00
SUBTOTAL.....		$2,496.89
1976	12 Holidays	$914.00
	Night Differential	$1,282.89
	Equipment Allowance	$300.00
SUBTOTAL.....		$2,496.89
TOTAL BENEFITS LOST.....		$6,871.65
1974 1975 1976	Approximate value of medical and dental insurance benefits lost for three years at $1,200.00 per year.....	$3,600.00
GRAND TOTAL WAGES AND BENEFITS LOST.....		$68,690.48

55. That the plaintiff has been otherwise generally damaged in addition to the foregoing specified and detailed damages in the sum of at least $1,500,000.00.

WHEREFORE, the plaintiff respectfully prays that

judgment be granted to him as to the first cause of action which shall revoke and rescind the order of the defendant Louis J. Frank, the then Commissioner of Police of the defend- and the Police Department of the County of Nassau and the defendant the County of Nassau and that this court in equity order the plaintiff's immediate reinstatement to his position as a Police Officer and Sergeant in the Police Department of the County of Nassau and the plaintiff further demands judgment on the second cause of action with specified and detailed damages in the sum of $118,690.48 which represents $68,690.48 for lost wages and benefits and $50,000.00 in attorney's fees and further, that the said plaintiff be awarded general damages as a result of all of the allegations alleged in the second cause of action in the sum of $1,500,000.00, together with such other, further and different relief as to this court may seem just and proper.

Dated: Mineola, New York
July 19, 1976

SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.

James R. Moffatt

By: JAMES R. MOFFATT, ESQ.
Attorney for Plaintiff
Office & P.O. Address
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

A-35

EXHIBIT "A"

POLICE DEPARTMENT
COUNTY OF NASSAU, N. Y.

Charges and Specifications

Mineola, N. Y., 19

To the Commissioner of Police:

I hereby charge Sergeant (Rank) GRIPPE, (Surname) Daniel (Given Name) A. (Initials) 102 (Shield No.) First Precinct (Command)

with: VIOLATING (1) ARTICLE IX, RULES 10 AND 11; (2) ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

SPECIFICATIONS:

in that 1. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102 First Precinct, did for approximately five years, between October 1968 and September 1973, act in a manner unbecoming an officer which was prejudicial to the good order and efficiency of the police department in that, he did carry on an intimate and illicit relationship with a female other than his wife.

2. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102 First Precinct, did, at, on or about 1600 hours on September 12, 1973, make a false communication in that, he did write in a report that "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department."

Complainant Vincent J. Redican

Vincent J. Redican
Deputy Chief Inspector
Commanding Officer
First Division

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

VINCENT J. REDICAN, being duly sworn, deposes and says; that he is a Deputy Chief Inspector and Commanding Officer of the First Division, and the complainant herein. That he has read the foregoing charges and specifications and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. That the source of deponent's information are the books and records kept by the Police Department and the investigation made by the Police Department, County of Nassau, New York.

Vincent J. Redican

Sworn to before me this
4th day of September 1973

A-35 (a)

"EXHIBIT A"
5

8000

EXHIBIT "A"

POLICE DEPARTMENT

COUNTY OF NASSAU, N.Y.

Charges and Specifications

with

Notice of Examination

In re Complaint

—vs.—

GRIPP, Daniel L.
Surname Given Name Initials

Sergeant 102 First Precinct
Rank Shield No. Command

FIRST ENDORSEMENT

September 18, 19 78

Forward to the Commissioner of Police (through official channels).

I have investigated these charges and recommend:

TRIAL

FILE

[signature]
Chief Inspector

NOTE: If recommended for File or Disposition, set forth reasons above.

Exhibit A

NOTICE OF EXAMINATION

Mineola, N. Y., September 12, 19 73

Time 1000

To Sergeant GRIPPO
RANK SURNAME

TAKE NOTICE that charges have been preferred against you to the Commissioner of Police and that these charges with specifications thereof are as herein set forth.

You are directed to answer in accordance with the Rules and Regulations of the Police Department at the time and place hereinafter designated.

A hearing will be held and the charges examined into by and before the Trial Commissioner at Police Headquarters, Mineola, N. Y.

September 20, 1973 1000
DATE TIME

and will be continued as ordered until concluded.

By direction of the
Commissioner of Police

I acknowledge due personal service of the within charges and specifications and notice of examination, this 13 day of

SEPTEMBER, 19 73

at 1630 M.

Sgt. Robert P. Grippo

Witness Det. Arthur Peters
Shield Number 154

PDCH 240 - REV. 12/68

EXHIBIT "B"

POLICE DEPARTMENT
COUNTY OF NASSAU, NEW YORK

COPY TO

INTERNAL CORRESPONDENCE

DATE October 22, 1973

TO Sergeant Daniel A. Grippe, Shield Number 102,
First Precinct

FROM Commissioner of Police

SUBJECT NOTICE OF DISPOSITION, CASE NUMBER 3869, CHARGES AND SPECIFICATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK

1. Sergeant Daniel A. Grippe is hereby notified that after hearing on Specifications Numbers 1 and 2, Charges and Specifications, Case Number 3869, the Trial Commissioner recommended on October 18, 1973 to the Commissioner of Police the following:

Found Guilty - Specification Number 1

Found Guilty - Specification Number 2

2. Sergeant Daniel A. Grippe is hereby notified that the Commissioner of Police on October 22, 1973, approved the above determination and recommendation of the Trial Commissioner and issued an order to said effect and that a further order was issued by the Commissioner of Police based on the determination of Guilty in Case Number 3869, and prior disciplinary record, whereby the said Sergeant Daniel A. Grippe was ordered dismissed and his name dropped from the rolls of the Police Department, County of Nassau, New York effective October 22, 1973 at 2400 hours.

Louis J. Frank
Commissioner of Police

I hereby acknowledge due personal service on me of the foregoing Notice of Disposition of Charges and Specifications, this _____ day of _____ 1973.

Rank Surname Given Name Shield Number Command

Witness:

A-35 (b)

"EXHIBIT B"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

EXHIBIT "C"

In the Matter of

The Application of DANIEL A. GRIPPE,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

S I R :

PLEASE TAKE NOTICE that upon the annexed verified petition an application will be made to this Court, at a Special Term, Part I, thereof, to be held at the Courthouse, Supreme Court Drive, Mineola, New York, on the 29th day of November, 1973, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an Order transferring the above entitled matter to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, for the relief demanded in the petition, together with such other, further and different relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that a verified answer and supporting affidavits, if any, must be served at least five (5) days before the return date hereof.

Dated; Mineola, New York
November 8, 1973

Yours, etc.,

BRACKEN & SUTTER
Attorneys for Petitioner
Office & P. O. Address
50 Mineola Boulevard
Mineola, New York 11501
747-5800

TO: LOUIS J. FRANK, Commissioner
Nassau County Police Department
1490 Franklin Avenue

"EXHIBIT C"
A-36

EXHIBIT "C"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

In the Matter of

THE APPLICATION OF DANIEL A. GRIPPE,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

LOUIS J. FRANK, Commissioner of Police of The County of Nassau,

Respondent.

----------x

TO THE SUPREME COURT OF THE STATE OF NEW YORK :
COUNTY OF NASSAU :

The petition of DANIEL A. GRIPPE, respectfully states and alleges:

1. That on or about the 1st day of September, 1959 petitioner was appointed a patrolman with the Police Department of the County of Nassau.

2. That on or about the 29th day of January, 1971 petitioner was appointed a Sergeant of the Police Department of the County of Nassau.

3. That on or about the 13th day of September, 1973 petitioner was suspended from his duties and detail as a policeman in the Police Department, County of Nassau, and thereafter continued under suspension until October 22, 1973, at which time the petitioner was dismissed from his position as a Nassau County Sergeant and his name dropped from the rolls of the Police Department; that at the time of such suspension and dismissal petitioner was a Civil Service employee of the State of New York.

EXHIBIT "C"

4. That on or about the 13th day of September, 1973 Deputy Chief Inspector Vincent J. Redican of the Nassau County Police Department preferred charges against the petitioner for violating certain rules and regulations of the Police Department of the County of Nassau, and a copy of the charges and specifications dated September 13, 1973 is attached hereto and marked Exhibit A.

5. That upon information and belief, Deputy Chief Inspector Frank E. Klecak was duly designated Trial Commissioner to conduct the hearing on said charges.

6. That thereafter a hearing on said charges and specifications was conducted between October 2, 1973 and October 5, 1973.

7. That at the conclusion of said hearing the Trial Commissioner reserved decision.

8. That upon information and belief the Trial Commissioner thereafter allegedly determined and recommended to the Commissioner of Police that petitioner be found guilty on said charge specifications and that he be dismissed from his duties as a Nassau County Sergeant.

9. That thereafter the Commissioner of Police allegedly adopted and approved said determination and recommendation of the Trial Commissioner and on the 22nd day of October, 1973 caused to be personally delivered to the petitioner an Order dismissing the petitioner as a Nassau County Sergeant. That a copy of said Order dated October 22, 1973 is attached hereto and made a part hereof, marked Exhibit B.

10. That the right to institute this proceeding is authorized by Article 78 of the Civil Practice Law and ~~Rules, and Section~~ 76 of the Civil Service Law.

11. That the petitioner excepts, objects and appeals from the alleged recommendation and determination of the said Trial Commissioner and from the determination and order of the Commissioner of Police suspending and dismissing petitioner as aforesaid and respectfully makes application to this Court to review the record of hearing or trial held before the said Trial Commissioner, his alleged recommendation and determination and the determination and orders of the Commissioner of Police suspending and dismissing petitioner, and to annul and vacate the same suspending and discharging petitioner from his position as a Sergeant on the grounds that the said alleged recommendation and determination of the Trial Commissioner and determination and orders made by the Commissioner of Police suspending and dismissing the petitioner were predetermined, unfair, unreasonable, unnecessary, illegal and contrary to law and violative of the petitioner's constitutional rights and that all of the competent, legal evidence was insufficient as a matter of law to support the alleged recommendation, determinations and orders as aforesaid upon the following grounds, among others.

12. That the petitioner over proper objection was not permitted to confront and cross-examine his accuser, namely one Hester I. Jerome, with whom the petitioner allegedly had an adulterous relationship and the Trial Commissioner failed, neglected and refused to produce said witness who was called on behalf of the Police Department, although duly demanded to do so, before concluding the Department's case against the petitioner.

13. That without even endeavoring to call the said Hester I. Jerome, the petitioner's accuser, the Police Department at the very outset of the hearing, over proper legal objection, permitted the following hearsay testimony of this absent witness by permitting: a) Officers to testify as to

EXHIBIT "C"

what this alleged witness told them; and b) the introduction of written recollection of what these Departmental officers allegedly recollected from their conversations with this absent witness.

14. That the Trial Commissioner, over proper legal objection, received into evidence certain documents purporting to be hotel and/or motel registrations of the petitioner without any legal foundation for the receipt of these documents whatsoever.

15. That the Trial Commissioner received into evidence, over proper legal objection, a so-called admission or confession of the petitioner (in the form of a "To - from" letter) which was coerced from the petitioner under duress and fear under the guise of a lawful order of the petitioner's superiors, one of said petitioner's superiors having stated, "God damn you, Grippe, if you don't answer each and every question asked of you and write a complete and full statement as ordered, you will be brought up for insubordination and suspended on the spot!". That the coerced confession and report the petitioner was required to write (a copy of which is annexed hereto and marked Exhibit C) was made pursuant to an illegal order and the said confession and report of the petitioner was otherwise inadmissible by virtue of the fact that the petitioner was deprived of his right to counsel before making the same although counsel was duly demanded by the petitioner, nor was the petitioner warned, nor afforded any warning whatsoever that anything he said could be used against him in either the so-called Departmental trial or a criminal proceeding. That in this connection the petitioner is informed that the offense of adultery is a Class B Misdemeanor.

EXHIBIT "C"

16. That the so-called determination of certain vague superior officers of the Police Department of the County of Nassau that the Departmental investigation into the petitioner's conduct was to be conducted as an internal matter and affair of the Police Department instead of as a criminal investigation was capricious, arbitrary and illegal, and in violation of the Police Department's own rules and regulations by reason of the fact that the Police Department of Nassau County, the respondent Commissioner of Police, cannot grant immunity from prosecution and upon information and belief a Grand Jury of the County of Nassau and the District Attorney of the County of Nassau has not and did not confer immunity from prosecution upon the petitioner.

17. That the Trial Commissioner committed fundamental error when he refused to allow or to consider the petitioner's offer of proof which would have shown that the conduct allegedly engaged in by the petitioner was conduct commonly engaged in by members of the Police Department of the County of Nassau and that therefore the respondent's determination to base charges upon the petitioner's private life which invaded his right to privacy and which conduct was totally unrelated to the performance of his duties as a Police Officer, was discriminatory and was, upon information and belief, based upon matters outside the record in this proceeding; that the aforesaid determination of the respondent deprived the petitioner of his right to receive equal protection of the law and the respondent, in so prosecuting the petitioner unequally applied the law as to the petitioner and as to his rights and right of privacy.

18. That upon information and belief the Trial Commissioner and the respondent gave little weight or insuf-

EXHIBIT "C"

ficient weight to the expert testimony of two eminent sociologists who testified on behalf of the petitioner that the private conduct allegedly engaged in by the petitioner did not involve moral turpitude and further that the alleged conduct did not and would not shock the conscience of the average citizen regardless of his status or situation in life.

19. That the recommendation of the Trial Commissioner and the determination of the respondent to dismiss the petitioner from his position as a Sergeant inthe Police Department of the County of Nassau were pre-determined and it was common knowledge that the petitioner would be dismissed by reason of the fact that one of the highest ranking superior officers who allegedly investigated the charges against the petitioner informed the petitioner immediately before the service of charges upon him on September 13, 1973 that if he did not resign he would be dismissed; that it was the consensus of opinion among the select superior officers of the Police Department who allegedly investigated the petitioner's conduct that: a) The charges should be preferred; b) that the petitioner was guilty of the same; 3) that the petitioner should be dismissed and upon information and belief, the foregoing sentiments and attitudes of these superior officers were conveyed to the respondent before, during and after the alleged fair hearing which was afforded to the petitioner.

20. That upon information and belief, the Trial Commissioner failed to make any findings of fact or adequately state reasons to support his alleged recommendations and as a consequence thereof the determination and order of the Commissioner of Police is arbitrary, capricious, illegal and incapable of adequate review by this Court.

EXHIBIT "C"

21. That the recommendation, determination and orders aforesaid suspending the petitioner from his duties as a Sergeant from September 13, 1973 to October 22, 1973 and thereafter dismissing the petitioner from his duties on October 22, 1973, constitute an abuse of discretion in imposing the measure of punishment, penalty and discipline; that said punishment was unwarranted and was excessive.

22. That the determination and order of the respondent suspending the petitioner from his duties as a Nassau County Sergeant from September 13, 1973 up to and until October 22, 1973 was contrary to law, applicable statute and Civil Service law of the State of New York.

23. That said recommendation, orders and determinations aforesaid were not sustained by substantial and sufficient legal evidence.

24. That said recommendation, determination and orders were contrary to law, contrary to the weight of the evidence and upon all the competent legal proof and legal evidence, there was a preponderance of proof against the existence of the facts found against petitioner with respect to said charges which did not warrant the findings of guilty, and that such a finding of guilty against your petitioner would be set aside by the Court as against the weight of the evidence in the event said findings of guilty were made against the petitioner upon the verdict of a jury rendered in an action in a Supreme Court of the State of New York.

25. The hearing conducted before the Trial Commissioner was not held in a quasi-judicial manner; that numerous errors were made in receiving evidence, in failing to receive evidence and excluding evidence, all of which constituted prejudicial error, the consequence of which the recommendation and determination of the Trial Commissioner cannot be sustained.

EXHIBIT "C"

26. That the suspension and dismissal of the petitioner as heretofore set forth was not made in any civil action, special proceeding, Court of record, or Judge of a Court of record, and the same was not made in a criminal matter; that the decision of the Commissioner of Police finally determined the rights of the petitioner and the said decision cannot be adequately reviewed by appeal to a Court or other agency or officer.

27. That by virtue thereof petitioner's suspension and dismissal from his position as a Sergeant in the Police Department of the County of Nassau was illegal and contrary to law.

28. That no previous application has been made for the relief sought herein to any Court or Judge.

WHEREFORE, your petitioner respectfully prays that an order be made and entered pursuant to Article 78 of the Civil Practice Law and Rules reviewing the determination, orders and decision of the respondent as heretofore set forth, and upon such review, annulling the suspension and dismissal of the petitioner from his position as Sergeant in the Police Department of the County of Nassau, directing that the petitioner be forthwith reinstated, and directing payment to the petitioner of his pay during the time he was unlawfully suspended, and further directing that these proceedings be transferred to the Appellate Division of the Supreme Court of the State of New York, Second Department.

Dated: Mineola, New York
November 5th, 1973

DANIEL A. GRIPPE

EXHIBIT "C"

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

DANIEL A. GRIPPE being duly sworn, deposes and says: That deponent is the petitioner in the within action; that deponent has read the foregoing petition and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true.

Daniel A. Grippe
DANIEL A. GRIPPE

Sworn to before me this 2nd
day of November, 1973.

James R. Moffatt

JAMES R. MOFFATT
NOTARY PUBLIC, State of New York
No. 30-2738170
Qualified in Nassau County
Commission Expires March 30, 1973

EXHIBIT "F"

To be submitted by
JAMES R. MOFFATT

Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of

The Application of DANIEL A. GRIPPE,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

against

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

BRIEF FOR PETITIONER

BRACKEN & SUTTER
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"EXHIBIT F"

EXHIBIT "F"

TABLE OF CONTENTS

	PAGE
Statement as to the Nature of the Case	2
Facts	2
As to charge and specification 1	2
As to charge and specification 2	5
POINT I—The essential concepts of due process were violated in the conduct of the investigation of charges against the petitioner, the preferment of the same; the admissibility of evidence at the hearing; the conduct of the hearing and the determination under appeal	7
POINT II—The petitioner was not guilty of making a false statement as alleged in specification two based upon a rational interpretation of the evidence and at the very best all that is involved in this specification is a difference of opinion ...	16
POINT III—That although the hearing officer ruled that he would give due weight to expert testimony as to the present mores of society concerning the conduct under scrutiny, both the hearing officer and the Commissioner of Police failed and neglected to do so	18
POINT IV—The imposition of the extreme penalty of dismissal, as the measure of punishment, was too severe	22
Conclusion	24

EXHIBIT "F"

Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of

The Application of DANIEL A. GRIPPE,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

against

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

BRIEF FOR PETITIONER

Statement Under Rule 5531

1. Index #18842—73.

2. Daniel A. Grippe, Petitioner, against Louis J. Frank, Commissioner of Police, Police Department, County of Nassau, Respondent.

3. Proceeding was commenced in the Supreme Court, Nassau County.

4. Proceeding was commenced on November 19, 1973. Notice of Petition and Verified Petition served on November 19, 1973. Answer served on January 28, 1974.

EXHIBIT "F"

5. Application for a judgment pursuant to Article 7803 of the Civil Practice Law and Rules.

6. To Review the determination of the Respondent in dismissing Petitioner from the position of Sergeant and directing that Petitioner be forthwith reinstated.

7. The printed full record on appeal method is being used.

Statement of the Nature of the Case

This is a proceeding brought pursuant to Article 7808 of the CPLR to review the determination of the Commissioner of Police of Nassau County dated October 22, 1973 which found the Petitioner guilty of specification 1 in that he carried on an intimate and illicit relationship with a female other than his wife and found the Petitioner guilty of specification 2 in that he made a false communication and which determined that the Petitioner is dismissed from his position in the Nassau County Police Department.

Facts

(As to Charge and Specification 1.)

That in the early afternoon on September 4, 1973 Sergeant Daniel A. Grippe, of the Nassau County Police Department went to see his commanding officer, Inspector DeBeche, Commander of the First Precinct. He asked to discuss a personal matter with his commanding officer (p. 182).* Sergeant Grippe stated that he had had an extra marital affair with a woman for several years—that he loved her but not enough to give up his wife and children. That this woman had created a scene at his mother's

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* Record on Appeal.

EXHIBIT "F"

house—that she threatened to have his job and that she was going to report him to his commanding officer. That Inspector DeBeche told the respondent to wait and see what happens (p. 190). That approximately 20 minutes to ½ hour after Sergeant Grippe left the precinct, the woman a Mrs. Hester Jerome came in to see Inspector DeBeche at the First Precinct (p. 185). Mrs. Jerome told Inspector DeBeche she had spoken to Sergeant Grippe and his wife and had threatened to take his job because she wanted him back (p. 191). She was irate (p. 187). That Inspector DeBeche recommended that she go to see a doctor (p. 187). That after leaving the First Precinct Mrs. Jerome called Inspector DeBeche approximately 4:00 p.m. on the telephone on September 4 and informed him that she had been to a Doctor and was taking tranquilizers. That she was very excited and sounded distraught on the phone even more so than she had been when she appeared at Inspector DeBeche's office earlier (p. 193). That she wanted to make a formal complaint and wanted the petitioner's job (p. 194). That Inspector DeBeche admitted on cross examination that he would of kept the matter private unless it had some bearing on Sergeant Grippe's work, unless there was a complaint (p. 194). That he, Inspector DeBeche was present when Sergeant Grippe appeared with Patrolman Schmidt (PBA President) at the office of the Chief of District on September 12, 1973 (p. 195) pursuant to an order. That the petitioner requested when he appeared that he would like to have a lawyer present. He directed this question to Chief Redican which request was denied. That there was no question in Inspector DeBeche's mind, that respondent made this request for a lawyer which was denied (p. 196). Deputy Chief Inspector Redican proceeded to interrogate the respondent (pp. 23-42). That at one point the respondent asked to have a private conversation with Patrolman Cliff Schmidt. That thereafter Chief of District, McConnell entered the room and informed the respondent that he

EXHIBIT "F"

must answer Chief Redican's questions and submit a full and complete report of the entire incident or that he would be suspended from duty. Sergeant Grippe then prepared a lengthy report regarding the affair with Mrs. Jerome. It was a direct order (p. 43). That said report over objection on every Constitutional basis hereinafter urged was introduced into evidence (pp. 46-48 reproduced at page of the record of appeal). That after the report was written the interrogation of Sergeant Grippe continued (pp. 48-55). Chief Redican testified as to conversation he had had with Mrs. Jerome on September 5, 1973 (pp. 56-62). There was thereafter introduced into evidence certain pitctures and motel records, County exhibits (County's 5, p. 66, p. 417 of the record; County's 5A-J, 6A-J pp. 67, 68, p. 419 of the record; County's 9, p. 80, p. 425 of the record; County's 10, pp. 84-85, p. 427 of the record; County's 11, pp. 87, 88, p. 429 of the record). That Chief Redican admitted on cross examination that Mrs. Jerome told him on September 6, 1973 that she had lied during the course of her conversation with them on September 5, 1973 (p. 94) and wanted to go no further with her complaint against him. That she was sorry that she had possibly jeopardized Sergeant Grippe's job (p. 126). She further informed Chief Redican that she was not going to sign any statement. Her then attorney subsequently informed Chief Redican of this same fact (p. 95). That thereafter Chief Redican went to various motels and locations. That he had these records during the course of his interrogation of the petitioner on September 12, 1973 (p. 95). That Chief Tredwell stated, according to Chief Redican, that counsel could not be present at the interrogation of Sergeant Grippe (p. 97). That upon cross examination Chief Redican disclosed that Sergeant Grippe at first refused to answer many questions on the grounds that they were personal and unconnected with police matters (p. 100). That he, Chief Redican told Sergeant Grippe that he must answer these questions or be subject to charges of in-

EXHIBIT "

subordination or be suspended (p. 100). That Sergeant Grippe continued to refuse to answer questions on this basis (p. 100), but Sergeant Grippe answered all questions relating to when he was on duty (pp. 101-102). Chief Redican admitted that in asking these questions of Sergeant Grippe that these questions would incriminate him (p. 104) and yet if he did not answer these questions Sergeant Grippe would be insubordinate (pp. 104-105). When the Chief of District, Chief McConnell, returned to the room he told Sergeant Grippe, according to Chief Redican, "who the hell do you think you are pulling this bull shit with me" and further "you answer these god damn questions right now or you will be charged with insubordination and be immediately suspended" (p. 105). Chief Redican stated at this point Sergeant Grippe was in a state of shock (p. 106). That Chief McConnell said "do you hear me Grippe" and "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (p. 107).

(As to Charge and Specification II.)

Chief Redican stated in his opinion that Sergeant Grippe made an official false statement when he wrote "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department" (p. 108). Chief Redican admitted that suspension may have meant a different thing to Sergeant Grippe than it did to him (p. 109). Chief Redican admitted that if Sergeant Grippe would of substituted the word suspension for dismissal that he would not have made a false statement (p. 109). That thereafter Chief Tredwell reprimanded Sergeant Grippe for a rather long time and cursed him. That he called him a mouse and not a man (p. 110). That thereafter Sergeant Grippe was directed to return on September 13 for the purpose of being served with charges (p. 111). According to Chief Redican, that on the 13th of

EXHIBIT "F"

September 1973 Chief Tredwell before serving charges upon the petitioner informed the petitioner that he could resign; that resignation would not jeopardize his future. That if he (Grippe) was found guiity he would be fired (pp. 112-113). That he, Chief Redican didn't know if many of the things Mrs. Jerome stated were true or not true (p. 115). That she wanted to get Sergeant Grippe where it would really hurt him because the one thing he loved most in the world was his job in the Police Department (pp. 115-116). She was vindictive (p. 117). That counsel for the petitioner was not permitted to go into the policy of the Police Department of the County of Nassau regarding prosecution of the crime of adultery, the divorce of members of the Police Department on the grounds of adultery and related matters (pp. 118-119). Counsel for petitioner's offer of proof to show that Sergeant Grippe has been singled out and was therefore deprived of equal protection of the law was rejected (p. 120). However the trial commissioner did indicate (at page 123) that he would give due weight and consideration what the mores of the present day society are concerning this alleged behavior is through proper testimony. Chief Redican admitted that no Miranda warnings was given which fact was conceded to by the County Attorney (p. 143). Yet, Chief Redican stated that if a crime has been committed according to the rules and regulations of the Police Department it must be investigated as a criminal matter (p. 146). That in Chief Redican's opinion the matter could be treated as an internal matter or as a crime or both (p. 147). That the District Attorney was never contacted to Chief Redican's personal knowledge (p. 147).

Chief Tredwell stated in his direct testimony that he could not remember that the petitioner requested an attorney (p. 167), but that he had told Patrolman Schmidt (PBA President) that Grippe was not entitled to an attorney (p. 166). Chief Tredwell admitted that he could not determine whether or not this matter was to

EXHIBIT "F"

be handled as a criminal matter; that he was advised by the Second Deputy Commissioner of Police that this would be an internal investigation and that he would not go criminal (p. 171). That the only law enforcement official has a right to determine the right whether a person will be prosecuted criminally is the District Attorney and the Grand Jury; that we have not consulted with the District Attorney and it was decided that we would not go criminal (p. 172). Chief Tredwell admitted that he had no authority to advise the petitioner that if he were found guilty he would lose his job (pp. 174-179).

The petitioner produced two sociologists as expert witnesses who testified in their opinions that the conduct under scrutiny did not involve moral turpitude or shock or outrage the average citizen. Professor Barash's testimony and the reasons he gave for his opinion are set forth at pages 200 through 285 of the record. Doctor Wildeman's testimony and the reasons he gave for his opinion are set forth at pages 286-328; 361-382.

POINT I

The essential concepts of due process were violated in the conduct of the investigation of charges against the petitioner, the preferment of the same; the admissibility of evidence at the hearing; the conduct of the hearing and the determination under appeal.

A.

The petitioner was deprived of his fundamental right to confront his accuser.

That at the hearing on October 2, 1973 the Department introduced a letter into evidence from an attorney dated September 25, 1973 wherein the said attorney stated that he represented Mrs. Jerome and that Mrs. Jerome would not appear at the hearing even though she had been served

EXHIBIT "F"

with a subpoena (77, County's exhibit 8 reproduced at page of the record). Counsel for the petitioner insisted that the County produce this woman for confrontation and cross examination (p. 76). This request was ignored throughout the hearing except the County Attorney stated that he was going to have this subpoenaed witness cited for contempt sometime (p. 78), which upon information and belief has never occurred.

It is to be noted that Mrs. Jerome shortly after making her accusations to Chief Redican recanted and moreover she told him that her most serious allegations were all lies (p. 126). The Department nevertheless chose to introduce these hearsay allegations in its direct case through the testimony of Chief Redican (pp. 61-63). The hearing officer, in his so-called findings (p. 389 of the record), does not state what hearsay testimony of Mrs. Jerome that they relied upon if any. Essential due process elements are applicable to an administrative hearing (*Hecht* v. *Monaghan*, 307 N.Y. 461, 420). One of the most essential due process elements is the right of confrontation and cross examination.

> "The right of confrontation with and the opportunity of cross examination of witnesses is the traditional means for attacking adverse testimony offered at any trial or hearing. This is recognized as the proper means for testing the reliability of such testimony; and the probative force given to the same by a trier of the facts should depend upon such a testing. Consequently, it is well settled that a fair hearing on the administrative level requires that a party be given the opportunity of cross examination of witnesses giving material testimony which may be used against him." (*Matter of Erdiman* v. *Ingraham*, 28 A.D. 2nd 5, 8 & 9).

EXHIBIT "F"

B.

The confession of the respondent was coerced after his right to counsel was denied and was inadmissible.

The hearing was permeated with hearsay in testimonial and in documentary form and there would be no residuum of substantial legal evidence absent the petitioner's coerced confession or report (County's exhibit 3, p. 44 reproduced at p. 414 of the record). The evidence in this proceeding under review consisted of Mrs. Jerome's hearsay statements introduced through the testimony of Inspector DeBeche and Chief Redican and various pictures and motel records all of which were introduced over proper objection without any foundation (County's 5, p. 66, p. 417 of the record; County's 5A-J, 6A-J, pp. 67, 68, p. 419 of the record; County's 9, p. 80; p. 425 of the record; County's 10, pp. 84-85, p. 427 of the record; County's 11, pp. 87, 88, p. 429 of the record).

> "Hearsay statements standing alone lack sufficient probative force to sustain a determination required to be supported by substantial evidence. (*Matter of Erdiman* v. *Ingraham*, 28 A.D. 2nd, 5, 7-9; See *Edison County* v. *Labor Bd.*, 305 U.S. 197, 230)". (*In the Matter of Louis N. Sabatini* v. *William E. Kirwan*, 42 A.D. 2nd 1022, p. 1024).

It has been held however that hearsay and other non legal evidence is not barred in an administrative hearing and all that is required is that there be a residual of competent evidence of probative force so substantial as to support the determination (*Matter of Reynolds* v. *Triborough Bridge and Tunnel Authority*, 276 A.D. 388, 390). In the proceeding below the only substantial evidence of probative force, which is incompetent, is the confession or report coerced from the petitioner after he had requested counsel. As was detailed in the facts portion of this brief

EXHIBIT "F"

the said confession or report was coerced from the petitioner by high ranking officers who threatened him with insubordination, loss of employment or at very least suspension if he did not write a complete and full report. Although it may be conceded that the Constitutional right to privacy and the right to exercise the fifth amendment rights do not apply to purely administrative proceedings at the investigation stage (*Garrity* v. *New Jersey*, 385 U.S. 493, 500; *Matter of Randel*, 153 N.Y. 216, 219; *Matter of Rouss*, 221 N.Y. 81, 86; *Matter of Wysell*, 10 A.D. 2d 199; *Matter of Ungar*, 27 A.D. 2d 925), the interrogation of the petitioner cannot be deemed as a matter of law to be merely an administrative investigation where Constitutional rights are not applicable. Perhaps the leading case in the State of New York as to the right of counsel at the investigatory stage of an administrative proceeding is (*Felix Popper* v. *Board of Regents of the University of the State of New York*, 26 App. Div. 2nd 871), wherein the Court sets forth the general principal as follows:

> "Petitioner also urges that a transcript of an interview, in which he freely disclosed his relationship with the unlicensed individual, which he underwent under oath at the office of the Division of Professional Conduct should not have been admissible against him in the ensuing disciplinary proceedings because he was not represented by counsel at the interview and because he was not informed of his privilege against self incrimination or the nature of the charges against him. We find no merit in these contentions in the instant case. At the time the interview was conducted no charges were then pending against him and thus obviously he could not be informed of such. As to the presence of counsel, petitioner did not request counsel and the presence of counsel is not a mandatory requirement in an administrative proceeding such as the interview here involved despite the fact that information elicited might well provide the bases for

EXHIBIT "F"

subsequent criminal charges (*Matter of Groban*, 352 U.S. 300). Moreover, while the privilege against self incrimination would extend to the interview in question, petitioner did not raise the privilege at the time of the interview and his counsel made no specific objection on the grounds of self incrimination at the time the interview was read into the record".[1]

Notwithstanding the protestation of the high ranking officers who testified at the hearing below that they elected, without any authority in law whatsoever to treat the affair as one of internal investigation, it is clear that charges were pending against the petitioner which may have involved the crimes of adultery among others. As Chief Redican testified under the rules and regulations of the Police Department of the County of Nassau, the Police must investigate and prosecute any and all crimes. Article 6 (rule 1) of the rules and regulations of the Police Department of the County of Nassau provide in part "Rule 1. It is the duty of the Police Department and members of the force at all times of the day and night . . . enforce all laws and ordinances over which the Police Department has jurisdiction". Again as was previously noted Chief Redican readily admitted that in asking the questions he asked of Sergeant Grippe he knew that they would incriminate him. Since the only person and body which could lawfully grant immunity to the petitioner was the District Attorney of the County of Nassau and/or the Grand Jury of the County of Nassau, the petitioner had every right to believe that the allegations against him which were in fact criminal in nature were being investigated in accordance with the rules and regulations of the Police Department of the County of Nassau. Even more important the petitioner was never informed by any of his

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[1] Counsel for the petitioner specifically objected to the admission of his confession or report on the basis of his 5th and 6th amendment rights and coercion (pp. 46-48).

EXHIBIT "F"

interrogators that the matter under investigation was going to be treated as an internal investigation, as distinguished from a criminal investigation, thus putting the petitioner between the rock and the whirlpool; there is not one scintilla of evidence that this disclosure was ever made by anyone at the interrogation stage. Hence it is respectfully submitted that his right to counsel was absolute;

> "As further indicated by that court, the determination of whether deprivation of the right to counsel constitutes a violation of due process is dependent upon the consideration of the function of counsel in the hearing concerned." (*Matter of Kabelka* v. *City of New York*, 55 Misc. 2d 570, 572, *citing Nason* v. *Immigration and Naturalization Service*, 370 F. 2d 865 (2d Cir. 1967).

Any counsel worth his salt would certainly have advised Sergeant Grippe under the circumstances to exercise his fifth amendment privileges. This Court and the Court of Appeals has recognized the right of a petitioner to exercise his fifth amendment privileges, in an administrative investigation when the disclosure asked must expose him to punishment for crime.

> "We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the constitution, the disclosure asked of him must expose him to punishment for crime (*Matter of Rouss*, 221 N.Y. 81, 86, *Cardozo, J.*)." (*Matter of Zuckerman*, 20 N.Y. 2nd 430, 438).

The petitioner answered all questions put to him at his interrogation from the very beginning that related to his work and duty (pp. 101-102) and this is all that should have been asked (absent counsel and the giving of his constitutional warnings) (*Perla* v. *N. Y.*, 392 U.S. 273, 21

EXHIBIT "F"

L. Ed. 1082; *Gardner* v. *Broderick*, 392 U.S. 273, 20 L. Ed. (2d) 1082, p. 1084, par. 6; *c/f Matter of Anonymous* v. *Arkwright*, 5 A.D. 2nd 790, p. 791).

Moreover the Court of Appeals, has determined that a coerced confession, as distinguished from a confession, obtained in violation of fifth and sixth amendment rights is not admissible in a civil proceeding (*Terpstra* v. *Niagara Fire Ins. Co.*, 26 N.Y. 2d 70). Referring to *Escobedo* (378 U.S. 478), and *Miranda* (384 U.S. 436) and *People* v. *Donovan* (13 N.Y. 2d 148; *right to counsel*), the Court ruled:

> "None of the rules announced in these cases reached the question of the actual voluntariness of the confession, in the sense that the confession might in fact have been coerced, a completely different and time-honored ground for exclusion. Thus, a confession may be suppressed under these procedural rules for reasons entirely separate and apart from those determinative of its voluntariness." (*Terpstra* v. *Niagara Fire Ins. Co.*, *supra*, p. 74).

C.

The entire proceeding from its investigation stage onward was fraught with prejudice, bias and predeterminations as to what action should be taken and what punishment should be imposed.

> "The procedure invoked against petitioner in the cause before us violates the essentials of a sound judicial proceeding. In the administration of justice it is not only requisite that a tribunal invested with judicial powers should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt of suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of those exercising judicial functions to render a righteous judgment but it is of transcendent impor-

EXHIBIT "F

tance to the litigants and the public generally that there should not be the slightest suspicion as to their fairness and integrity. The impartiality of the judgment seat must always remain above suspicion." (*Matter of Bender* v. *Board of Regents, Etc.*, 262, App. Div. 627, 631).

There is more than a slight suspicion as to the fairness and integrity of the proceeding at bar in that;

1. The petitioner's interrogators never informed him at the interrogation stage that, contrary to the rules and regulations of the Police Department of Nassau County, they had elected to treat the matter as an internal investigation or civil matter as distinguished from a criminal investigation.

2. The highest ranking police officer involved, the Chief of District, who is the second highest uniformed officer in the Police Department, coerced a report from the petitioner which related solely to his private life by employing such language as "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (p. 107).

3. After the petitioner proceeded to sit down and write a full and complete report which took approximately 2 or 3 hours (p. 167), and after he was interrogated once again thoroughly containing contents of same (pp. 48-52) which took approximately 1 hour (pp. 167-168), another high ranking officer, an Assistant Chief Inspector proceeded for approximately an hour to vilify, berate and reprimand the petitioner by employing profanity.

4. Although the petitioner was ordered to write a full and complete report under fear of charges of insubordination and suspension he was asked to return the next day, that is the 13th of September, for the sole purpose of

EXHIBIT "F"

having specifications served upon him whereupon he was suspended on the spot (p. 111).

5. The same high ranking police officer, the Assistant Chief Inspector, informed him on this occasion that he should resign; that resignation would not affect his future, but if he were found guilty of the charges he would be dismissed (pp. 174-175).

6. All of the high ranking officers involved in the proceeding below, including the hearing officer, were well known to the Commissioner of Police who made the ultimate determination dismissing the petitioner from the Police Department after 14 years of service. It is to be noted that all these high ranking officers received promotions during the tenure of the Commissioner of Police.*

7. The essentials of due process were not only disregarded at the investigation and interrogation stages: They were disregarded at the Hearing as heretofore noted.

Although the integrity of the judgment seat must always remain above suspicion the filing of the second specification against the petitioner and the determination that he was guilty of the second specification raises further doubts as to the fairness of the hearing officer's so-called findings concerning the same and the Commissioner of Police's determination that the petitioner was guilty of this specification.

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* Redican promoted from Inspector to Deputy Chief Inspector (1 star).

McConnell promoted from Assistant Chief Inspector (2 stars) to Chief of District (3 stars).

Treadwell promoted from Deputy Chief Inspector (1 star) to Assistant Chief Inspector (2 stars).

Klecak promoted from Inspector to Deputy Chief Inspector (1 star).

EXHIBIT "E"

POINT II

The petitioner was not guilty of making a false statement as alleged in specification two based upon a rational interpretation of the evidence and at the very best all that is involved in this specification is a difference of opinion.

Specification two in substance states that the petitioner in his confession, referred to as a report on September 12, 1973, made a false communication, to wit, "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department". It is well to read the aforesaid quoted portion of specification number two in context. Paragraph 1 of the petitioner's report dated September 12, 1973 (p. 414) (reproduced at p. 19 of the petition) reads:

> "The writer, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, was ordered by Chief of District to write this report concerning his personal and private life, a report that Sergeant Grippe believes to be personal in nature and not involving his duties as a police officer with the Police Department, County of Nassau, New York. Sergeant Grippe believes that his Constitutional Rights and liberties as a citizen of the United States of America are being violated along with his Natural Rights as a free man. Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department, and under such circumstances will write this report."

What evidence sustains this charge? Chief Redican the petitioner's principal interrogator informed the petitioner on several occasions that he must write a full and complete

EXHIBIT "F"

report or suffer charges of insubordination and suspension (pp. 100; 102-103), after the petitioner had refused to answer many questions on the grounds that they were related solely to his private life and that they were not in any manner, shape or form connected with his duties as police officer. The Chief of District at one point returned to the interrogation room accompanied by the other high ranking officers whereupon he repeatedly threatened the petitioner with immediate suspension unless he wrote a full and complete report and answered each and every question put to him (pp. 105-107). Chief Redican on cross-examination stated that at this point the petitioner was in a state of shock (p. 106). Chief Redican further admitted that suspension may have meant a different thing to the petitioner than it did to him (p. 109). Chief Redican further admitted that if Sergeant Grippe had substituted the word suspension for the words threatening the loss of his job, in his opinion, the petitioner would not have made a false statement (p. 109). Chief Redican on cross-examination also enumerated what a police officer is stripped of upon suspension, namely: there is no pay; he must hand in his shield; surrender his revolver; surrender his equipment and uniforms; surrender his identification card. That the suspended police officer cannot work or perform any duties as a police officer whatsoever. Chief Redican further commented that it is common knowledge that suspension entails the above matters (pp. 141-142).

Bearing in mind all the foregoing facts and circumstances the petitioner undoubtedly in his own mind was of the opinion that he was going to be dismissed (or that suspension was tantamount to dismissal) if he did not write the report in question and as a matter of fact he was apparently dismissed ultimately because he did in fact write a full and complete report. Furthermore there is no evidence that this so called discrepancy, that is, the employment of the word threat of losing his job in lieu of suspension, in his confession was ever called to his atten-

EXHIBIT "F"

tion during interrogation concerning the contents of same by Chief Redican or called to his attention at any time by anyone until he was served with the charges the very next day on September 13, 1974. It is respectfully submitted that a difference of opinion involving as it does here a state of mind in quandary is not sufficient to sustain this specification which on its face is of a most serious nature (*In the Matter of Gormley* v. *N.Y. City Transit Authority*, 23 A.D. 2d 880, 881).

POINT III

That although the hearing officer ruled that he would give due weight to expert testimony as to the present mores of society concerning the conduct under scrutiny, both the hearing officer and the Commissioner of Police failed and neglected to do so.

The petitioner was prevented (an offer of proof was made; p. 120) from making an offer of proof that the conduct under scrutiny was a common practice. In lieu thereof the hearing officer stated he would give due weight, through proper testimony, as to what the mores of the present society are concerning this alleged behavior (p. 123).

The petitioner called Dr. John Wildeman, the Chairman of the Sociology Department of Hofstra University, whose specialty is the field of criminology and Associate Professor Meyer Barash, a Professor of Sociology at Hofstra University, whose specialty is marriage and the family, as expert witnesses to testify on the behalf of the petitioner concerning the mores of society relative to the conduct under scrutiny in the proceeding below. The qualifications of Professor Barash are set forth in the record at pages 200-208. The qualifications of Dr. Wildeman are set forth in the record at pages 286-292. After these professors had familiarized themselves with specification 1. and after they had been afforded an ample opportunity to digest the evi-

EXHIBIT "F"

dence, they were each asked the following hypothetical questions substantially in the form as follows:

> I ask you further, Professor, to assume the following, that pursuant to Section 255.17 of the Penal Law of the State of New York, adultery is defined as a person who is guilty of adultery when he engaged in sexual intercourse with another person at a time when he has a living spouse or the other person has a living spouse. Adultery is a Class B misdemeanor. I also ask you to assume, sir, that the law had defined the element of moral turpitude involved in the alleged commission of crimes or conduct which could constitute or possibly constitute a crime or an offense as follows: with respect to the question of moral turpitude, that phrase was thoroughly analyzed by Mr. Justice Shapiro in its application to the qualifications of a juror in *People* v. *Ferguson*, 55 Misc. 2d 711. The Court pointed out that the dictionary definition of moral turpitude was the quality of a crime involving grave infringement of the moral sentiment of a community as distinguished from statutory mala prohibita.
>
> The Court also cited an earlier judicial definition of the phrase as an act of baseness, vileness or depravity in the private or social duties which man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man citing *People* v. *Ferguson*, 55 Misc. 2d at page 981.
>
> I ask you, sir, first of all, whether or not you have formed an opinion; an opinion with a degree of reasonable certainty from the sociological standpoint, whether the conduct complained of concerning this respondent constitutes moral turpitude?
>
> I ask you also, sir, have you formed an opinion with any degree of certainty based from the standpoint of

EXHIBIT "F"

a sociologist whether or not the conduct complained of the respondent, Sergeant Grippe, in this proceeding, taking into account the mores of today, whether or not the reaction of the average citizen at any level of society to the conduct here under scrutiny would be one of shock or outrage?

The hypothetical questions addressed to Professor Barash are set forth on pages 212-214 of the record and the hypothetical questions addressed to Doctor Wildeman are set forth on pages 295-298 and at page 303 of the record.

Both Professors stated that in their opinions the conduct complained of does not constitute or involve moral turpitude and that the conduct complained of would not shock or outrage the average citizen at any level of society regardless of his station in society. To be succinct, Doctor Wildeman stated the following reasons for his opinions:

Statistical figures on divorce (p. 303) based upon the United States Department of Health, Education and Welfare statistics, statistical summaries and several treatises.

Prevalence of the theme of adultery in publications such as Playboy, Penthouse and womens' magazines such as Redbook, stage productions, movies and television (p. 308).

Lack of coverage in newspapers indicates that we no longer consider this theme to be news; however, the theme sells in the world of entertainment (p. 309).

Adulterous persons male or female are no longer the objects of social ostracism (p. 310).

A study conducted of homosexuals throughout the country showed a demonstratively weak reaction which led the witnesses to infer that if such a study

EXHIBIT "F"

were made concerning adultery an even lesser reaction would be found to exist.

The Penal Law provisions relating to adultery have not been enforced for decades and law enforcement patterns follow community pressures, demands, feelings and the mores of the people (p. 311).

Adultery is virtually untreated in criminolgy textbooks (p. 312), specific texts are discussed at 376-379 of the record.

Professor Barash stated the following reasons for his opinion:

Alfred Kinsey's report, "Sexual Behavior in the Human Male." (p. 223)

1970 Census Report (p. 223).

Sunday New York Times Book Review for the past five years reveals that 50% of the best sellers deal with sex from a traditional standpoint and otherwise (p. 226).

The Sociology of films; the advertisements relating to the same; a statistically significant percentage of films, both first run and re-run are rated either R or X and don't attract exclusively male audiences (pp. 226-227).

Teaching experiences (p. 228).

It is respectfully submitted that the hearing officer and the Commissioner of Police in their findings and determinations should have taken the foregoing sociological testimony into account, certainly, insofar as the measure of punishment to be imposed, if any.

EXHIBIT "G"

EXHIBIT "F"

POINT IV

The imposition of the extreme penalty of dismissal, as the measure of punishment, was too severe.

The Courts have consistently applied the test, relating to the imposition of punishment, as to whether the conduct under scrutiny was job related. In the proceeding at bar the conduct in question was not job related at all. It was a private affair until the scorned woman went to the petitioner's commanding officer, in the heat of anger to get his job on September 5th, 1974. She tried to withdraw the charges as a civilian complainant the next two days; she admitted that she lied; she was contrite and was sorry about the whole matter. The fact that this woman as the civilian complainant had lied about her affair with the petitioner and that she wished to withdraw the charges evidently made no impression upon the petitioner's superior officers.

In the *Matter of Short* v. *Looney*, 34 A.D. 2nd, 676 2nd Dept., the officer was found guilty of exposing himself to two girls or soliciting them. This Court held:

> "The record in this proceeding reveals that the untoward conduct for which petitioner was dismissed from the police force was not related to his official duties."

In the *Matter of Walter Holborow* v. *New York City Transit Authority*, 37 A.D. (2d) 608, 1st Dept., the Court held that there was not sufficient substantial evidence to determine that the petitioner gave a false statement and as to his associations with and bar room fight with a man he knew had a criminal background the court stated:

> "The record in this proceeding reveals that petitioner's association with Shamus was solely a bar room acquaintanceship and was not related to his official duties. We are therefore of the opinion that the

EXHIBIT "F"

penalty of dismissal was excessive." Citing *Matter of Short* v. *Looney, supra.*

In the *Matter of Mason* v. *Police Commissioner of the City of New York,* 32 A.D. (2d) 515 1st Dept., the petitioner had been found guilty of apparent illicit cohabitation with a female by living with her within the geographical limits of his precinct. This Court in the exercise of discretion reduced the punishment imposed from dismissal to suspension for a period of five days, citing *Matter of Bovino* v. *Scott,* 27 A.D. (2d) 912, Mod. 22 N.Y. (2d) 214.

In the *Matter of Wright* v. *Looney,* 35 A.D. (2d) 2nd Dept., p. 555, the petitioner had been found guilty of apparently stealing two gallons of gasoline from the precinct's gas pump and this court reduced the punishment of dismissal to suspension.

The petitioner has taken the last five years to go to college in the evenings full time and he received in June of 1974 his B.A. degree and he graduated with a 3.2 average. He was promoted from Patrolman to Sergeant on January 29, 1971. He has a prior unblemished record of 14 years of service except for the charges and specifications referred to in the respondent's order of dismissal which is the subject of this proceeding. The petitioner has related as regards these other charges and specifications that although he was advised to appeal the same by the PBA attorney he did not do so upon the advice of fellow police officers and the PBA President who informed him that if he did not "appeal" these convictions would not be held against him or used against him by the Police Department of the County of Nassau.

EXHIBIT "F"

CONCLUSION

Judgment should be granted to the petitioner annuling and rescinding the order and determinations of the respondent dated October 22, 1973 and reinstating the petitioner upon the grounds that they were based upon insufficient, coerced, illegal and incompetent vidence in violation of the petitioner's constitutional rights and the essential elements of due process, or if the court finds that there was a residuum of substantial evidence to sustain a guilty finding as to specification 1, that the Court in the exercise of its discretion modify the measure of punishment imposed, together with such other, different and further relief as to the Court may seem just and proper.

Respectfully submitted,

BRACKEN & SUTTER
Attorneys for Petitioner
Office & P.O. Address
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

JAMES R. MOFFATT
Of Counsel

EXHIBIT "D"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 15, 1974.

HON. [illegible], Acting Presiding Justice,
HON. [illegible]
HON. H. HENRY GUNTUSCELLO
HON. HENRY J. LATHAM
HON. [illegible]
HON. [illegible]
HON. [illegible]
HON. A. DAVID BENJAMIN
HON. FRED J. MINER
Associate Justices

In the Matter of Daniel A. Grippe,

Petitioner,

v.

Louis J. Frank, Commissioner of Police of the County of Nassau,

Respondent.

Order Confirming Determination.

The above named Daniel A. Grippe, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR by a petition verified November 3, 1973, to review a determination of the respondent, dated October 22, 1973; respondent having filed an answer thereto; by order of the Supreme Court, Nassau County, dated December 12, 1973, the proceeding was transferred to this court for determination; and the proceeding having been submitted by James R. Moffat, Esq., of counsel for the petitioner and submitted by Ronald J. Morelli, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the proceeding is hereby dismissed on the merits and determination of respondent, dated October 22, 1973, confirmed, without costs.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division.

"EXHIBIT D"

EXHIBIT G

COURT OF APPEALS
STATE OF NEW YORK
----------X

In the Matter of

DANIEL A. GRIPPE,

Respondent-Appellant,

- against -

LOUIS J. FRANK, Commissioner of Police
of the County of Nassau,

Respondent.

----------X

NOTICE OF MOTION FOR REARGUMENT, AFFIDAVIT
and BRIEF IN SUPPORT THEREOF

JAMES R. MOFFATT,
Of Counsel

SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.
33 WILLIS AVENUE
MINEOLA, N. Y. 11501

"EXHIBIT G"

EXHIBIT "G"

TABLE OF CONTENTS

PAGE

Notice of Motion..... 1

Affidavit in support of motion for reargument..... 4

Brief in support of motion

Statement..... 8

Point I - That constitutional provisions mandate an appeal as of right when an administrative agency's determination is only reviewed in the first instance by the Appellate Division..... 9

Point II - That leave to appeal should be more freely granted in the interest of justice in this proceeding which originated, in effect, in the Appellate Division..... 12

Point III - The respondent-appellant was deprived of an essential element of a fair trial, namely, the fundamental right to confront and cross-examine his accuser and regardless of the state of the evidence this Court must reverse the administrative determination on appeal.... 13

Conclusion - The motion for reargument should be granted and upon reargument the order of this Court granted February 12, 1975 reversed and the respondent-appellant's application to appeal as of right, or, alternatively, leave to appeal granted..... 18

COURT OF APPEALS
STATE OF NEW YORK

----------X

In the Matter of

DANIEL A. GRIPPE,

Respondent-Appellant,

- against -

NOTICE OF MOTION

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

----------X

S I R :

PLEASE TAKE NOTICE that upon the proceeding upon appeal herein, the argument had herein, the annexed affidavit of JAMES R. MOFFATT, sworn to the 6th day of May, 1975, the order of this Court had on February 12, 1975, upon all the previous papers and the record on appeal to the Appellate Division, and the respondent-appellant's brief to the Appellate Division which were heretofore submitted to this Court and on all of the proceedings heretofore had herein, the undersigned will apply to this Court at the Court of Appeals Hall, Albany, New York, on the 19th day of May, 1975, or as soon thereafter as counsel

EXHIBIT "G"

can be heard, for an order granting reargument of the order of this Court granted February 12, 1975, which denied the respondent-appellant the right to appeal as of right from the order of the Appellate Division granted the 15th day of November, 1974, without opinion, or, alternatively, for leave to appeal from said order on the grounds that the respondent-appellant has the right to appeal as of right pursuant to Paragraph 1, Article 6, Section 3 of the New York State Constitution and to the extent that Sections 5601 and 5602 of the CPLR conflict with these constitutional provisions, the Constitution controls; that leave to appeal should be freely granted in the interest of substantial justice in proceedings which originate, in effect, in the Appellate Division and finally on the ground that this Court misapprehended or overlooked the constitutional question that the respondent-appellant was denied his right to a fair hearing in that he was completely deprived of the most essential element of a fair trial, namely, the right to confront and cross-examine his only accuser, notwithstanding any concession,

EXHIBIT "G"

for the sake of this argument only, that the determination below was based upon a residual of substantial legal evidence.

Dated: Mineola, New York
May 7, 1975

Yours, etc.,

SUTTER, MOFFATT, YANNELLI
& ZEVIN, P.C.
Attorneys for Respondent-
Appellant
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(516) 747-5800

TO:

HON. JAMES M. FLAVIN
Clerk, Court of Appeals
Court of Appeals Hall
Albany, New York 12207

HON. JOHN F. O'SHEUGHNESSY
County Attorney, Nassau County
Nassau County Executive Building
West Street
Mineola, New York 11501

EXHIBIT "G"

COURT OF APPEALS
STATE OF NEW YORK
----------X

In the Matter of

DANIEL A. GRIPPE,

Respondent-Appellant,

- against -

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

JAMES R. MOFFATT, being duly sworn, deposes and says:

That he is a member of the firm of Sutter, Moffatt Yannelli & Zevin, P. C., attorneys for the respondent-appellant herein. That as such he is fully familiar with the instant appeal as well as the trial of the issues of the administrative proceedings below. That this is an appeal from an order of the Appellate Division, Second Judicial Department, entered November 15, 1974, which order confirmed the determination of the Commissioner of Police

EXHIBIT "G"

of Nassau County, wherein the respondent-appellant, a sergeant and a member of the Police Department of the County of Nassau for fourteen years, was dismissed due to the fact that he allegedly had an extra-marital affair while off-duty.

Without reviewing to any appreciable extent the evidence submitted in the administrative hearing below in this affidavit, suffice it to say that it consisted of the introduction of a confession which was coerced from the respondent and it was introduced not only in violation of this established rule of the non-admissibility of coerced confessions, but in violation of the rights secured to him pursuant to the Fifth and Sixth Amendments of the Constitution of the United States. After the introduction of this statement, over objection, the administrative agency then called two police officers to testify as to what the scorned woman had informed them her relationship with the respondent was for the period of time that it continued. While testifying in the administrative agency's direct case, these officers never volunteered that the following day after the complaint was made the

EXHIBIT "G"

respondent's accuser recanted, changed her story, wished to withdraw the complaint and admitted that she lied, etc. The administrative agency admittedly subpoenaed the respondent's accuser, but she refused to appear and testify and the administrative agency took no further steps to force her to appear thereby depriving the respondent of the most essential element of a fair trial, namely, the right to confront his accuser to get to the truth, and bring out the truth, so that the trier of the facts could determine what probative force and reliance to give to this witness' testimony which necessarily depended upon the testing of it by cross-examination. The facts capsuled here are fully set forth in the facts portion of the respondent-appellant's brief to the Appellate Division which was heretofore submitted to this Court.

The facts and authorities relied upon in reargument are, however, properly referred to by reference to the particular portions of the record and authority hereto submitted to this Court. (See the brief portion of this application for reargument.)

EXHIBIT "G"

WHEREFORE, your deponent respectfully requests that an order be made herein granting the respondent-appellant reargument of the order of this Court granted February 12, 1975, and on such reargument that the respondent-appellant be granted by order the right to appeal as of right, or, alternatively, in the interest of substantial justice he be granted leave to appeal by this Court, together with such other, further and different relief as to this Court may seem just and proper.

James R. Moffatt

JAMES R. MOFFATT

Sworn to before me this

6th day of May, 1975.

John Papa

JOHN PAPA
NOTARY PUBLIC, State of New York
No. 30-6599710
Qualified in Nassau County
Commission expires March 30, 1976

EXHIBIT "G"

COURT OF APPEALS
STATE OF NEW YORK
----------X

In the Matter of

DANIEL A. GRIPPE,

Respondent-Appellant,

- against -

LOUIS J. FRANK, Commissioner of Police
of the County of Nassau,

Respondent.

----------X

BRIEF IN SUPPORT OF MOTION

STATEMENT

This is an application by the respondent-appellant to reargue the order of this Court granted February 12, 1975 which denied the respondent-appellant's application to appeal to this Court as of right, or, alternatively, for permission to appeal to this Court. The grounds upon which reargument is asked is that the Court overlooked and misapprehended the following points of law which are as follows:

1. That constitutional provisions allow and mandate an appeal as of right when an administrative agency's determination is only reviewed in the first

EXHIBIT "G"

instance by the Appellate Division and that the more restrictive formulation, which is provided for in Sections 5601 and 5602 of the CPLR, should not be given effect.

2. That leave to appeal is required in the interest of substantial justice due to the fact that our practice is and should be predicated on the theory that every litigant is entitled to at least one appeal from any important decision and that leave to appeal should be more freely granted in this proceeding which originated, in effect, in the Appellate Division.

3. Absent the considerations of constitutionally prohibited, tainted and hearsay evidence, there is no substantial evidence to support the determinations below. In any event, due process and a fair hearing were not had by reason of the fact that the defendant was unable to confront his only accuser who had lied and who wished to retract and withdraw the complaint which was never made under oath.

POINT I

THAT CONSTITUTIONAL PROVISIONS MANDATE AN APPEAL AS OF RIGHT WHEN AN ADMINISTRATIVE AGENCY'S DETERMINATION IS ONLY REVIEWED IN THE FIRST INSTANCE BY THE APPELLATE DIVISION.

That prior to 1942 the provisions of the CPA relating to an appeal as of right, the limiting words "administrative agency" did not appear in what is now Section 5601(a) of the CPLR. The appeal as of right provisions of these civil practice statutes are derived from Paragraph 1 of Article 6, Section 3 of the New York State Constitution which contains no such limitation on the right to appeal from an administrative determination (see in this connection Cohen and Karger, Powers of the New York Court of Appeals, 244, 245 and notes 34, 35 (revised edition 1952); 2 N.Y. Adv. Comm. Rep. 101 (1958).

As several highly regarded text writers have commented:

> "Since the Constitution controls in case of conflict and would be self-implementing even in the absence of statute, the more restrictive formulation in CPLR 5601 and 5602 should not be given effect." (Weinstein-Korn-Miller, New York Civil Practice, Appeals to the Court of Appeals, Section 5601.03, 1974 Edition).

With reference to the same subject matter another learned treatise states:

> "With respect to proceedings brought for judicial review of an administrative agency's determination, either under Article 78 or under a more specific statute, the question will be whether the initial judicial consideration is an "appeal" within the meaning of the limitation

> prescribed by the Constitution; if such a proceeding to review an agency's determination is instituted in the Supreme Court and appealed to the Appellate Division, then there will have been two "appeals" below, if the initial proceeding for judicial review is considered an "appeal", and a third review by the Court of Appeals would not lie as of right. However, under the former Judiciary Article of the Constitution and administrative agency was not deemed an "inferior court" for the purposes of review, and this result was codified in CPLR 5601 by expressly permitting appeal as of right from an order of the Appellate Division finally determining an action originating in such administrative agency. Hence it would seem that consistency with the former interpretation given to "inferior courts" would require a decision that the constitutional limitation upon a third level of review is not applicable in the case of initial judicial "review" of administrative proceedings by a court from which appeals go directly to the Appellate Division[2]."

It is respectfully submitted that the Court overlooked the fact that the Constitution of the State of New York allows the instant appeal as a matter of right and its provisions ought to control the appeal of the proceedings below.

[2]"This interpretation would affect not only appeals as of right, under CPLR 5601, but also appeals which may be taken only by permission, either of the Court of Appeals or the Appellate Division under CPLR 5602, subd a(1) (see §71:43 et seq., infra), or the Appellate Division alone under CPLR 5602, subd b(2) (see §71:50, infra)." (11 Carmody Wait 2d, Sec. 71:8, p. 15, 16).

EXHIBIT "G"

POINT II

THAT THAT TO APPEAL SHOULD BE MORE FREELY GRANTED IN THE INTEREST OF JUSTICE IN THIS PROCEEDING WHICH ORIGINATED IN EFFECT IN THE APPELLATE DIVISION.

That it was argued in Point I of this brief that the Court overlooked the fact that the legislature of the State of New York cannot limit the right of the respondent-appellant to appeal the administrative agency's determination below. That if the Court holds that where there is a conflict between the Constitution and Section 5601(a) of the CPLR the latter statute is deemed to control, then, it is respectfully submitted that this Court should exercise its discretion under Paragraph 6, Article 6, Section 3 of the New York State Constitution which provides that permission can be granted by the Court of Appeals and "should be allowed and required in the interest of substantial justice". Traditionally, an appellant has always had the right to have two bites at the apple. In other words, until an inferior Court and an appellate Court has ruled against him an appeal can be taken as a matter of right. It is respectfully submitted that in order to afford the respondent-appellant substantial justice, this

EXHIBIT G

Court should exercise its discretion and permit him to appeal:

> "Since our practice is predicated on the theory that every litigant is entitled to at least one appeal from any important decision, leave to appeal should be more freely granted in cases originating in the Appellate Division." (Weinstein-Korn-Miller, New York Civil Practice, Appeals to the Court of Appeals, Section 5601.06, 1974 Edition).

POINT III

THE RESPONDENT-APPELLANT WAS DEPRIVED OF AN ESSENTIAL ELEMENT OF A FAIR TRIAL, NAMELY, THE FUNDAMENTAL RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER AND REGARDLESS OF THE STATE OF THE EVIDENCE THIS COURT MUST REVERSE THE ADMINISTRATIVE DETERMINATION ON APPEAL.

The order of the Appellate Division below is important for this Court to review not simply because the Appellate Division was the first Court to consider the administrative determination, but because the Appellate Division permitted an administrative agency to receive into evidence a coerced confession (which this Court has never allowed, even apart from constitutional consideration; Terpstra v. Niagara Fire Insurance Co., 26 N.Y. 2d 70 cited at page 13 of respondent-appellant's brief to the

Appellate Division which was heretofore submitted to this Court), and when the balance of the administrative determination is based upon the hearsay of an accuser who lied, who wished to retract and recant the complaint which was never made under oath, which the respondent-appellant was wholly deprived of attacking, by the failure of the administrative agency to produce for confrontation the only competent witness against the accused, and, it is respectfully submitted, that the right of cross-examination is the most fundamental safeguard afforded to a respondent in an administrative proceeding and which cannot be dispensed with unless waived (Matter of Sowa v. Looney, 23 N.Y. 2d 329, 333). The foregoing areas present grave questions of constitutional law which this Court should and can consider without any undue burden since the question is not now whether the respondent could have been found guilty of the charges preferred, but rather was he fairly convicted of the same by giving minimal consideration to his due process rights to a fair hearing.

EXHIBIT "G"

Assuming now for the sake of argument only that there was some other substantial evidence to sustain the respondent's conviction of the charges below this Court overlooked the fact that the respondent was nevertheless denied a fair hearing because he cannot cross-examine the hearsay testimony of his accuser who was never produced for confrontation.

> "Moreover, hearsay evidence may not be used by an administrative tribunal or officer in such a manner as to deprive a party of the right to a fair hearing where that right is guaranteed by law. Such right would be illusory if the administrative tribunal or officer could ground its determination on investigatory data and hearsay evidence." (Matter of Erdman v. Ingraham, 28 A D 2d 5, 7-8; see, also, Matter of Altschuller v. Bressler, 289 N.Y. 463.)" (In the Matter of John L. [illegible], Petitioner, v. State Liquor Authority, Respondent, 30 A.D. 2d 866).

The cited Matter of Erdman v. Ingraham was previously cited at length at page 8 of the respondent-appellant's brief to the Appellate Division which was heretofore submitted to this Court.

This Court must have also overlooked the appalling fact that when the administrative agency below put in this accuser's testimony against the respondent through the hearsay testimony of superior officers in the direct case

15

EXHIBIT "G"

these superior officers wholly failed and neglected to voluntarily bring to the trier of the facts attention that the accuser (this scorned woman) had retracted, recanted and admitted that she had lied (page 4 of the facts portion of the respondent-appellant's brief to the Appellate Division which is heretofore submitted to this Court). The petitioner's most fundamental right to get at the truth and to bring out the truth by cross-examination an essential element of a fair trial was denied him. He was impaled to a stake by false testimony which is admittedly hearsay. As the Court stated in Matter of Erdman v. Ingraham, supra:

> "This (cross-examination) is recognized as the proper means for testing the reliability of such testimony, and the probative force given to the same by a trier of the facts should depend upon such a testing." (emphasis supplied)

It is respectfully submitted that the proceeding Matter of Heckt v. City of Lackawanna, 44 A.D. 2d 763, 764 is well reasoned and despositive of the issues at Bar. There as in the proceeding below the administrative agency had subpoenaed the accuser, but the accuser refused to

EXHIBIT "G"

appear at the continued hearing. The Court held that this was a violation of the right of confrontation and stated the broad rule that the accuser's testimony must be stricken and that this rule is accorded great deference in the law. Moreover, the Court did not conclude that the burden should be placed upon the accused to seek further relief with respect to forcing the accuser to testify in order to protect such a fundamental right as that of cross-examination. The Court remitted the matter for further hearing. (In the proceeding at Bar it was the respondent who requested, indeed insisted, that the administrative agency force his accuser to testify; page 8 of the respondent-appellant's brief to the Appellate Division which was heretofore submitted to this Court.)

> "Nevertheless, no essential element of a fair trial can be dispensed with unless waived without rendering the administrative determination subject to reversal upon review. (Matter of Hecht v. Monaghan, 307 N.Y. 461; Matter of Greenebaum v. Bingham, 201, N.Y. 343, 347; Matter of Hilton Hotels Corp. v. Epstein, 14 A D 2d 399, 402, affd. 11 N Y 2d 978; Matter of Shields v. Hults, 21 A D 2d 745.)" (Matter of Sowa v. Looney, 23 N.Y. 2d, supra, page 333).

CONCLUSION

[redacted]

Respectfully submitted,

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Mineola, New York 11501
(516) 747-5800

JAMES R. MOFFATT
Of Counsel

-18-

EXHIBIT "G"

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of	
DANIEL A. GRIPPE,	REPLY AFFIDAVIT ON BEHALF OF RESPONDENT-APPELLANT
Respondent-Appellant,	
For an Order pursuant to Article 78 of the Civil Practice Law and Rules,	
- against -	
LOUIS J. FRANK, Commissioner of Police of the County of Nassau,	
Respondent.	

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

JAMES R. MOFFATT, being duly sworn, deposes and says:

That he is one of the attorneys for the Respondent-Appellant. That as such he is fully familiar with all the proceedings heretofore had. This affidavit is made in reply to the affirmation submitted on behalf of the Respondent in opposition to the Respondent-Appellant's motion for reargument, which is returnable to this Court on the 19th day of May 1975.

That the Respondent argues in the affirmation submitted in opposition that Points I and II of Respondents-Appellant's

EXHIBIT "G"

brief on reargument are irrelevant since they deal with conceptual and discretionary considerations by the Court. To the contrary, the Respondent-Appellant respectfully submits that the construction of the Constitution of the State of New York and the applicable provisions of the CPLR are questions of law, which the Court has always traditionally and inherently considered to be questions of law.

That your deponent takes strong exception to the statement which commences on the third paragraph of page 2 of the affirmation in opposition to this motion for reargument which reads:

> "Respondent-respondent's brief in the Appellate Division at Point I clearly indicates that petitioner-appellant's report was not a coerced confession as alleged by the petitioner-appellant."

That attached hereto, once again, is a copy of the Respondent's brief as submitted to the Appellate Division, which is marked Exhibit A. Contrary to the aforesaid allegation, the Respondent does not, in any way, in said brief question that the report or confession was not coerced except to point out that the Respondent-Appellant should have known that only the Commissioner of Police can fire him as distinguished from the right of high

EXHIBIT "G"

ranking officers to do so. Specifically, the only reference the Respondent makes to the confession appears on page 5 of said Respondent's brief, wherein it is asserted:

> "Petitioner contends that his statement was as a result of a mistaken belief that he would be dismissed if he did not complete the report as ordered.
>
> The record shows that Chief Redican only threatened Petitioner with suspension, if he failed to complete the report. (R. 100, 102-103). In fact, it must be stated that under no circumstances could Chief Redican dismiss anyone from the Police Department. §8-13.0 of the Nassau County Administrative Code gives sole power to the Commissioner to discipline members of the Police Department. In view of the fact that Petitioner had been a police officer for fourteen years, and especially since he had been the subject of another disciplinary proceeding within the preceding year, it is rather difficult to believe that Petitioner was unacquainted with the facts as to who has the authority to dismiss a police officer."

It is respectfully submitted that insofar as the Respondent's previous argument is concerned, it has already been conceded that it was coerced. If it is not conceded that it was coerced, the Respondent-Appellant has proven, beyond a reasonable doubt, that it was in fact coerced and in this connection, the Court's attention is respectfully referred to page 4 and 5 of

the Respondents-Appellant's brief heretofore submitted to the Appellate Division and to this Court, which is attached hereto and marked Exhibit B, which reviews the following uncontested facts by reference to the record on appeal:

> "That upon cross examination Chief Redican disclosed that Sergeant Grippe at first refused to answer many questions on the grounds that they were personal and unconnected with police matters (p. 100). That he, Chief Redican told Sergeant Grippe that he must answer these questions or be subject to charges of insubordination or be suspended (p. 100). That Sergeant Grippe continued to refuse to answer questions on this basis (p. 100), but Sergeant Grippe answered all questions relating to when he was on duty (pp. 101-102). Chief Redican admitted that in asking these questions of Sergeant Grippe that these questions would incriminate him (p. 104) and yet if he did not answer these questions Sergeant Grippe would be insubordinate (pp. 104-105). When the Chief of District, Chief McConnell, returned to the room he told Sergeant Grippe, according to Chief Redican, "who the hell do you think you are pulling this bull shit with me" and further "you answer these god damn questions right now or you will be charged with insubordination and be immediately suspended" (p. 105). Chief Redican stated at this point Sergeant Grippe was in a state of shock (p. 106). That Chief McConnell said "do you hear me Grippe" and "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (p. 107).[1]

[1] Chief McConnell was the second highest ranking uniformed officer of the Nassau County Police Department.

EXHIBIT "G"

The uncontradicted facts above constitute coercion as a matter of law, insofar as the so called report is concerned, for to rule otherwise would take us back to the days of the inquisition and the employment of the rack and strappado. Although the Respondent-Appellant only referred to the use of this coerced confession in a preliminary way in Point III of his brief on reargument to this Court, he also respectfully points out to the Court that this report or confession was not only obtained by means of coercion but it was obtained in violation of his fifth and sixth amendment rights (pages 12-13 of the Respondents-Appellant's brief to the Appellate Division; Exhibit B attached to this reply affidavit).

The affirmation in opposition to this application for reargument only concedes one thing, "point III (of the brief in support of reargument) can only be construed as a possible basis for reargument" (page 2 thereof). In this connection, the Respondent has failed to cite one authority or proposition of law of this Court, or any Court, which does not substain the proposition that this Court must entertain this appeal and reverse it solely on the basis, if on no other, that the Respondent-Appellant was denied the most fundamental and essential element

EXHIBIT "C"

to a fair trial namely, he was deprived of any and all right to confront and cross examine his only accuser, who admitedly lied and whose hearsay testimony constituted a substantial portion of the tainted evidence against him.

This Court's attention is also directed to the fact that the present affirmation in opposition submitted on behalf of the Respondent, and the Respondent's brief, heretofore submitted to the Appellant Division, make much of the erroneous proposition that the Respondent-Appellant's conviction in a prior disciplinary proceeding provides some basis for determining that the Respondent-Appellant is guilty of the charges in the proceeding at bar. This proposition is not only erroneous, it is highly prejudicial for, while it may be conceded, that an administrative agency may take into consideration prior conduct in the imposition of the measure of punishment to be imposed, such considerations are entirely irrelevant and unallowable in determining the merits of the proceeding and specifically, as the issue is now framed, was the Respondent-Appellant afforded minimal due process and in arriving at the determination that he was guilty, was the procedure employed in accordance with the standards mandated by the Constitution of the State of New York as heretofore interpreted

EXHIBIT "G"

and announced by this Court? The Respondent-Appellant previously anticipated such a prejudicial claim on behalf of the Respondent (see Point I(c) of his brief to the Appellate Division, heretofore submitted to this Court, page 13, Exhibit B, attached to this affidavit). The headnote reads:

> "The entire proceeding from its investigation stage onward was fraught with prejudice, bias and predeterminations as to what action should be taken and what punishment should be imposed."

WHEREFORE, your deponent respectfully prays that the Respondent-Appellant's application for Leave to Appeal to this Court, as a matter of right or alternately, for permission to appeal be in all respects granted, together with such other, further and different relief as to the Court may seem just and proper.

James R. Moffatt

JAMES R. MOFFATT

Sworn to before me this

15th day of May, 1975.

Frank E. Yannelli

FRANK E. YANNELLI
NOTARY PUBLIC, State of New York
No. 30-9788725
Qualified in Nassau County
Commission Expires March 30, 19...

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A. D. 1975.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 No. No. 20
In the Matter of
Daniel A.Grippe,
Appellant,
vs.
Louis J. Frank, Commissioner of Police of the County of Nassau,
Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk

A-37 (c)

"EXHIBIT E"

State of New York,
Court of Appeals

EXHIBIT "E"

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A. D. 1975.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

---

2 No. No. 20
In the Matter of
Daniel A.Grippe,
Appellant,
vs.
Louis J. Frank, Commissioner of Police of the County of Nassau,
Respondent.

An application for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said application be and the same hereby is denied.

Joseph W. Bellacosa
Clerk

State of New York,
Court of Appeals

EXHIBIT "E"

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of June A. D. 1975.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 Mo. No. 443
In the Matter of
Daniel A. Grippe,
Appellant,
vs.
Louis J. Frank, Commissioner of Police of the County of Nassau,
Respondent.

A motion having heretofore been made upon the part of the appellant in the above cause to this Court for reargument of motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal, papers having been duly submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph J. Bellacosa
Clerk of the Court.

EXHIBIT "E"

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of June A. D. 1975.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

No. No. 443

In the Matter of

Daniel A. Grippo,

Appellant,

vs.

Louis J. Frank, Commissioner of Police of the County of Nassau,

Respondent.

A motion having heretofore been made upon the part of the appellant in the above cause to this Court for reargument of motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal, papers having been duly submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa

Clerk of the Court.

EXHIBIT "H"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL A. GRIPPE,

Petitioner,

against

LOUIS J. FRANK, Commissioner of Police, Police Department, County of Nassau, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Of Counsel

"EXHIBIT H"

EXHIBIT "H"

TABLE OF CONTENTS

	PAGE
Opinion Below (There were no opinions delivered in the Courts below)	
Jurisdiction	1
Questions Presented	3
Citation of the Constitutional Provisions, Statutes, and Regulations Involved (their texts are set forth in the Appendix)	5
Statement	6
Argument	11
Conclusion	20
Appendix A—The Constitutional Provisions, Statutes, and Regulations Involved	1a
Appendix B—Charges and Specifications	9a
Appendix C—Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department	11a
Appendix D—Orders of the New York State Court of Appeals	13a

CASES CITED

Barber v. *Page*, 390 US 719	12
Connally v. *General Construction Co.*, 269 US 385 ...	18

PAGE

Davis v. *Alaska*, 415 US 308 12
Eisenstadt v. *Baird*, 405 US 438 16
Escobedo v. *Illinois*, 378 US 478 13
Gardner v. *Broderick*, 392 US 273 .....13, 15
Goldberg v. *Kelly*, 397 US 254 11
Gosa v. *Mayden*, 413 US 665 17
Grayned v. *City of Rockford*, 408 US 104 18
Greene v. *McElroy*, 360 US 474 11
Groban, 352 US 330 13
Kent v. *Dulles*, 357 US 116 16
Lanzetta v. *New Jersey*, 306 US 451 18
Lefkowitz v. *Turley*, 414 US 70 .....13, 14
Miranda v. *Arizona*, 384 US 436 ..... 9, 13
O'Callahan v. *Parker*, 395 US 258 .....16, 17
Olmstead v. *United States*, 277 US 438 16
Papachristou v. *City of Jacksonville*, 405 US 156 18
Parker v. *Levy*, 417 US 733 .....18, 19
Pointer v. *Texas*, 380 US 400 12
Roe v. *Wade*, 410 US 113 16
Sanitation Men's Association v. *Commissioner*, 392 US 280 14
United States v. *Cardiff*, 344 US 174 18

Statutes and Rules:

Supreme Court of the United States Rule 19 1

PAGE

Nassau County Administrative Code

Section 8-22.0 12

Penal Law of the State of New York

Section 255.17 13

EXHIBIT "H"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL A. GRIPPE,

Petitioner,

against

LOUIS J. FRANK, Commissioner of Police, Police Department, County of Nassau, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdiction

The grounds on which the jurisdiction of this Court is sought are set forth in Rule 19(a) of this Court. The Court of Appeals of the State of New York decided that the petitioner in a trial before an administrative tribunal was not deprived of due process and a fair hearing even though he was deprived of the foregoing constitutional rights:

(1) The petitioner had no opportunity to confront his only accusor who wished to recant, change and withdraw the charges she made against the petitioner. The hearsay testimony of this scorned woman was admitted against the petitioner and only the allegations she made in an original conversation were received in evidence, not her recanted version of what transpired.

EXHIBIT "H"

(2) The petitioner was wholly deprived of his right to counsel at the investigatory stage of the proceedings where he was the target of a criminal investigation. The petitioner should have been charged with the crime of adultery under the Penal Law of the State of New York if he was to be charged with anything under the mandate of New York statute, and hence the petitioner was entitled to counsel.

(3) A confession (called a report) was coerced and forced from the petitioner, and thereafter introduced into evidence.

All of the foregoing constitutional deprivations were duly objected to by petitioner's counsel at all stages of the proceedings below. The Court of Appeals of the State of New York ruled that these clear, uncontradicted and conceded violations of the constitutional rights of the petitioner were insufficient in and of themselves to allow the petitioner to either appeal to the State's highest court on direct constitutional grounds or to permit the petitioner to appeal to said court on a permission basis.

The Court of Appeals of the State of New York in two separate orders dated February 12, 1974, denied (1) the right of the petitioner to appeal on the grounds that constitutional questions were not directly involved and (2) denied petitioner's application for permission to appeal. The Court of Appeals of the State of New York by order dated June 16, 1975, denied re-argument of its aforesaid two orders.

It is respectfully submitted that the determinations of the Court of Appeals of the State of New York as outlined above are not in accordance with the applicable decisions of this Court, and that this Court will reverse the said determination of the Court of Appeals on any one of these constitutional deprivations or upon all of them. It was claimed in the courts below that there was some

EXHIBIT "H"

residue of so-called legal evidence which would support the petitioner's constitutional rights but regardless of this contention the trier of the facts gave great weight to this constitutionally prohibited evidence.

Questions Presented

1. In an administrative hearing, in the nature of a departmental trial wherein the petitioner was a police sergeant with 14 years of service in the Police Department of the County of Nassau is charged with conduct unbecoming an officer in that he allegedly engaged in an extramarital affair with a woman not his wife, while off-duty and in private, can the determination to dismiss the petitioner from the Civil Service employment for said alleged conduct be sustained when the petitioner was totally deprived of his right to confront and cross-examine his only accusor whose original hearsay testimony was freely admitted at the trial when it was thereafter brought out upon cross-examination that this scorned woman admitted that she had lied, that she wished to retract and recant her original statements made to superior officers and that she wished to completely withdraw the charges the next day after making them?

2. Is the denial of the petitioner's right to counsel guaranteed to him by the sixth amendment of the Constitution of the United States at the investigatory stage of the administrative hearing where the petitioner is the target of the investigation a sufficient additional constitutional ground to require a review of the administrative determination which dismissed the petitioner from his Civil Service employment?

3. Coupled with the foregoing constitutional deprivation can the Court of Appeals of the State of New York's failure to review the administrative determination stand

EXHIBIT "H"

when the administrative tribunal below allowed into evidence a lengthy report or confession of the petitioner which was coerced and forced from him under threat of loss of employment and which related to his alleged relationship with his woman accusor while off-duty?

4. Does the constitution protect the right to privacy of a citizen who is a member of a police department?

(a) From arbitrary and capricious investigations that intrude into the privacy of an employee's personal and private life that have no relationship to his official duties?

(b) Does an administrative tribunal have jurisdiction where the alleged violation of a police department's rules takes place outside the job environment and the police officer is off-duty?

5. Is the enforcement of Rules and Regulations that are so vague and ambiguous as to fail to indicate the proscribed conduct that in fact are used as a "catch-all", a violation of the due process clause of the Fourteenth Amendment?

The Court of Appeals in failing to review the petitioner's conviction in the administrative tribunal on these constitutional grounds impliedly determined that the petitioner was not deprived of a fair administrative hearing and that the violations of these constitutional rights were insufficient in and of themselves to require a review by said Court. It is respectfully submitted that this determination of the Court of Appeals of the State of New York is not in accord with the applicable decisions of this Court. Assuming without conceding that there was in fact a scintilla or residue of legal evidence which would support or tend to support the petitioner's conviction separate and apart from any constitutional consideration the reliance of the Court's below on any such evidence cannot be countenanced by virtue of the flagrant and intentional vio-

EXHIBIT "H"

lation of the aforesaid constitutional rights of the petitioner. The deprivation of these constitutional rights was objected to at each and every stage of the proceedings below, that is at the investigatory stage, at the actual trial itself, in the petitioner's brief to the Appellate Division of the Supreme Court of the State of New York and finally in the petitioner's application for re-argument to the said Court of Appeals.

Citation of the Constitutional Provisions, Statutes and Regulations Involved (Their texts are set forth in the Appendix)

Constitution of the United States:

Amendment 1
Amendment 4
Amendment 5
Amendment 6
Amendment 14

Constitution of the State of New York:

Article 1, Section 6

The New York State Penal Law:

Section 255.17

The Nassau County Administrative Code:

Section 8-13.0
Section 8-22.0

Rules and Regulations of the Police Department, County of Nassau, New York:

Article IX
Rule 8
Rule 9
Rule 10
Rule 11

EXHIBIT "H"

Statement

The Court of first instance was an administrative tribunal made up of a hearing officer (a member of the Police Department) appointed by the Commissioner of Police.

The portions of the testimony where the Federal questions were raised are as follows:

That the petitioner requested when he appeared that he would like to have a lawyer present. He directed this question to Chief Redican which request was denied. That there was no question in Inspector DeBeche's mind, that respondent made this request for a lawyer which was denied (p. 196).* Deputy Chief Inspector Redican proceeded to interrogate the respondent (pp. 23-42). That at one point the respondent asked to have a private conversation with Patrolman Cliff Schmidt. That thereafter Chief of District, McConnell entered the room and informed the respondent that he must answer Chief Redican's questions and submit a full and complete report of the entire incident or that he would be suspended from duty. Sergeant Grippe then prepared a lengthy report regarding the affair with Mrs. Jerome. It was a direct order (p. 43).

That at an early stage counsel for the Petitioner objected to the proposed use of the report (confession) on the grounds that it was coerced under the threat of suspension or dismissal; that at the time of his interrogation he could well have been charged with the crime of adultery, yet he was given no warnings; that he asked for counsel which was refused (pp. 26-28). This report was introduced into evidence over these objections (pp. 46-48).

Chief Redican testified as to the conversation he had had with Mrs. Jerome on September 6, 1973 over prior objec-

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* Refers to the page of the transcript of the Departmental trial printed in the Record on Appeal to the Appellate Division, 2nd Department.

EXHIBIT "H"

tion by the Petitioner's counsel on the basis that this conversation was the rankest form of hearsay, and that the admission of this conversation violates the Petitioner's right to confront this scorned woman under oath, and deprives him of his right to cross examination (pp. 56-57).

Although the Department subpoenaed Mrs. Jerome, she failed to appear. Counsel for the petitioner insisted that the County produce this woman for confrontation and cross examination (p. 76). This request was ignored throughout the hearing except the County Attorney stated that he was going to have this subpoenaed witness cited for contempt sometime (p. 78).

Chief Redican admitted on cross examination that Mrs. Jerome told him on September 7, 1973 that she had lied during the course of her conversation with them on September 6, 1973 (p. 94) and wanted to go no further with her complaint against petitioner. She was sorry that she had possibly jeopardized Sergeant Grippe's job (p. 126). She further informed Chief Redican that she was not going to sign any statement. Chief Tredwell stated, according to Chief Redican, that counsel could not be present at the interrogation of Sergeant Grippe (p. 97). Upon cross examination Chief Redican disclosed that Sergeant Grippe at first refused to answer many questions on the grounds that they were personal and unconnected with police matters (p. 100). That he, Chief Redican, told Sergeant Grippe that he must answer these questions or be subject to charges of insubordination (p. 100). That Sergeant Grippe continued to refuse to answer questions on this basis (p. 100), but Sergeant Grippe answered all questions relating to when he was on duty (pp. 101-102). Chief Redican admitted that in asking these questions of Sergeant Grippe, he knew that these questions would incriminate petitioner (p. 104) and yet if he did not answer these questions Sergeant Grippe would be insubordinate (pp. 104-105). When the Chief of District, Chief McConnell,

EXHIBIT "H"

entered the room he told Sergeant Grippe, according to Chief Redican, "who the hell do you think you are pulling this bull shit with me" and further, "you answer these god damn questions right now or you will be charged with insubordination and be immediately suspended" (p. 105). Chief Redican stated at this point Sergeant Grippe was in a state of shock (p. 106). That Chief McConnell said "do you hear me Grippe" and "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (p. 107).

Chief Redican stated in his opinion that Sergeant Grippe made a false official statement when he wrote "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department":

> Paragraph 1 of the petitioner's report dated September 12, 1973 (p. 414):
>
> "The writer, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, was ordered by Chief of District to write this report concerning his personal and private life, a report that Sergeant Grippe believes to be personal in nature and not involving his duties as a police officer with the Police Department, County of Nassau, New York. Sergeant Grippe believes that his Constitutional Rights and liberties as a citizen of the United States of America are being violated along with his Natural Rights as a free man. Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department, and under such circumstances will write this report." (p. 108)

Chief Redican admitted that suspension may have meant a different thing to Sergeant Grippe than it did to him (p. 109). Chief Redican admitted that if Sergeant Grippe

EXHIBIT "H"

would have substituted the word suspension for dismissal that he would not have made a false statement (p. 109).

Chief Redican admitted that no *Miranda* warnings were given which fact was conceded to by the County Attorney (p. 143). Yet, Chief Redican stated that if a crime has been committed according to the rules and regulations of the Police Department it must be investigated as a criminal matter (p. 146). That in Chief Redican's opinion the matter could be treated as an internal matter or as a crime or both (p. 147). That the District Attorney was never contacted to Chief Redican's personal knowledge (p. 147).

Chief Tredwell stated in his direct testimony that he could not remember that the petitioner requested an attorney (p. 167), but that he had told Patrolman Schmidt (PBA President) that Grippe was not entitled to an attorney (p. 166). Chief Tredwell admitted that he could not determine whether or not this matter was to be handled as a criminal matter; that he was advised by the Second Deputy Commissioner of Police that this would be an internal investigation and that he would not go criminal (p. 171). That the only law enforcement official that has a right to determine whether a person will be prosecuted criminally is the District Attorney and the Grand Jury; that we have not consulted with the District Attorney and it was decided that we would not go criminal (p. 172). Chief Tredwell admitted that he had no authority to advise the petitioner that if he were found guilty he would lose his job (pp. 174-179).

The petitioner, during his interrogation by high ranking officers of the police department and in his coerced confession, complained that his right to privacy was being infringed upon. His repeated refusal to answer questions which were personal and private in nature and had nothing to do with his duties as a police officer, even after Chief Redican threatened to charge the petitioner with insubordination for refusing to answer these certain ques-

EXHIBIT "H"

tions (pp. 41, 100-101), clearly indicates that the petitioner believed that his right to privacy was being violated. Although the petitioner refused to answer questions that were of a personal nature, he answered all questions that related to his official duties (pp. 101-102).

The police department's lack of jurisdiction was objected to during the administrative hearing by the petitioner's counsel, even at the outset of the hearing (pp. 9-10). The police department knew that it lacked the authority to handle the matter administratively, for only the District Attorney or the Grand Jury can lawfully decide not to prosecute criminally (p. 172). The proper forum should have been to try the matter in a court of law, but the police department has no control over the courts or its judges, and hence most of the department's so-called evidence, if not all, would have been suppressed. A servant becomes a slave when his master insists upon the control of his being outside the job environment. Thus, the servant loses his freedom, and the master becomes a slave owner.

The charge the petitioner was charged with fails to identify any violation of the rules and regulations of the police department, because it fails to point out any conduct or activity by the petitioner which had any relationship with the performance of his duties as a police sergeant. The charge tends to rely upon the Rules and Regulations and the Nassau County Administrative Code, *infra*. The terms, "Conduct unbecoming an officer", and "Prejudicial to the good order and efficiency of the Police Department", are vague and ambiguous. Firstly, what do these terms mean; and secondly, how can a man that is off-duty and out of uniform, allegedly engaging in conduct bearing no relationship to police duties, affect the efficiency of the police department or be unbecoming an officer? If the man committed a crime, and was lawfully convicted of such crime in a court of law, then and only then might the administrative agency take cognizance of off-duty activities, but this is not so in the case at bar.

EXHIBIT "H"

The petitioner thereafter argued in his Brief to the Appellate Division, Second Department and in the Court of Appeals that the petitioner had been deprived of the most essential element of due process, namely, the right of confrontation and cross examination, and that the confession of the petitioner was coerced after his right to counsel was denied and was inadmissible, but to no avail.

Argument

The probative force given to testimony by the trier of the facts should depend upon the testing of such testimony by confrontation and cross examination.

> "In almost every setting where important decisions turn on questions of fact, due process required an opportunity to confront and cross examine adverse witnesses." (*Goldberg* v. *Kelly*, 397 U.S. 254, 269)

Goldberg also cites a portion of *Greene* v. *McElroy*, 360 U.S. 474, 496-497:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence, consists *of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has

EXHIBIT "H"

been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer* v. *Texas,* 380 U.S. 400, 405) (Emphasis supplied)

The latter case also stands for the proposition that if the right of confrontation and cross examination is circumvented then the testimony should be suppressed (*Pointer* v. *Texas, supra,* pp. 407, 408; see also *Davis* v. *Alaska,* 415 U.S. 308, 320).

In the proceeding below, the hearsay testimony of the only accusor against the petitioner was in fact used against him. The recanted testimony of this accusor was never heard or much less considered by the trier of the facts. She never testified!

In the proceeding below, the witness was never shown to be actually unavailable and hence the party relying on her testimony had the absolute duty to make her available as a witness (*Barber* v. *Page,* 390 U.S. 719, 725).

It is the mandated duty of the Police Department (pursuant to Section 8-22.0, subdivision 10, of the Nassau County Administrative Code, *supra*) to enforce all statutes and ordinances, and under the facts and circumstances in the proceeding below, the petitioner's superior officers had the absolute obligation and duty, if they were to believe the

EXHIBIT "H"

allegations of the scorned woman, to prosecute the petitioner for the crime of adultery under Section 255.17 of the Penal Law of the State of New York (*supra*). The petitioner at his interrogation concerning this woman's allegations requested to be represented by counsel. It is respectfully submitted that under these circumstances that the petitioner was entitled to counsel (cf. re *Groban*, 352 U.S. 330, 337 and the dissent of Mr. Justice Black), and the warnings required by *Miranda* should have been afforded to him.

> "The petitioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (*Escobedo* v. *Illinois*, 378 U.S. 478, 484.)

The petitioner was placed between the "rock" and the "whirlpool" and as an experienced police officer he had every reason to believe that his superiors were investigating the crime of adultery and that they would follow their mandated statutory duties with reference to the enforcement of this penal statute or any other statute within their jurisdiction.

> "The threat of criminal prosecution was apparent . . . from the nature of the proceeding . . ." (*Lefkowitz* v. *Turley*, 414 U.S. 70, 82, footnote 2).

The petitioner did not refuse "to answer questions specifically, directly and narrowly relating to the performance of his official duties . . ." (*Gardner* v. *Broderick*, 392 U.S. 273, 278). To the contrary, the petitioner answered all of the questions which related to the performance of his official duties, but he initially refused until threatened to answer questions which were not related to his duties, but were related to his personal and private affairs (pages 7, 9-10 of the statement portion of this petition). Notwithstanding these protestations of the petitioner who was

EXHIBIT "H"

denied counsel, the petitioner was informed by a very high ranking superior officer "Do you hear me Grippe, you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (page 8 of the statement portion of this petition).

> "At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." (*Sanitation Men Assoc.* v. *Commissioner*, 392 U.S. 280, 285).
>
> "That answers *elicited upon the threat of the loss of employment are compelled and inadmissible in evidence.*" (*Lefkowitz* v. *Turley, supra*, p. 85) (Emphasis supplied)

Pursuant to the New York State Penal Law and the Nassau County Administrative Code, *supra*, it is conceded that the police department had a statutory obligation to investigate a complaint of a possible violation of the Penal Law. But when they took it upon themselves to unilaterally abandon their statutory duty to prosecute criminally, they circumvented the New York Criminal Procedure Law, because only the District Attorney or a Grand Jury may legally decide not to prosecute criminally. Thus, when the police department decided to treat the matter administratively, the deprivation of constitutional rights began to occur. The unavailability of the alleged complainant, the introduction of hearsay evidence, and the total disregard of the petitioner's constitutional rights, ushered in a situation where a travesty of justice was perpetrated and which was an out and out invasion of the petitioner's privacy.

EXHIBIT "H"

In light of *Gardner* v. *Broderick*, the petitioner's constitutional rights attached when the high ranking police officials no longer asked the petitioner to answer questions that related to his official duties, but those relating to his private and personal life. It must be repeated, that the petitioner answered freely all questions relating to his official duties, but refused to answer personal questions that had no relationship whatsoever to his police duties. Only after the petitioner was threatened with loss of employment, did he reluctantly answer questions which were clearly beyond the scope of his employer's inquiry.

The police department arbitrarily and capriciously invaded the privacy of the petitioner. It did so under the guise of allegedly investigating a civilian complaint, but as cross-examination brought out there was no civilian complaint. The alleged complainant withdrew her complaint, recanted, stated that she lied, and confessed that the only reason she made the complaint was out of anger, jealousy, vindictiveness and malice. It was not until after the complaint was withdrawn that Chief Redican, a high ranking member of the police department, embarked on his witch hunt or investigation with the sole purpose to get Sergeant Grippe. With the zeal of a detective on a hot lead investigating a notorious criminal, Chief Redican's odyssey covered hundreds of miles, at great expense of the taxpayers of Nassau County. And for what? To invade the private life of the petitioner, to gather tainted evidence, to peek into the privacy of the bedroom, an area far beyond the scope for alleged departmental investigation. And why?

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts,

EXHIBIT "H"

> their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." (*Olmstead* v. *United States*, 277 U.S. 438, 478 (1928), Brandeis, J., dissenting). (Emphasis supplied)

This Court has held that the right of privacy means right of the *individual*, married or single, to be free from unwarranted governmental intrusion into the bedroom (*Eisenstadt* v. *Baird*, 405 U.S. 438).

Mr. Justice Douglas quoting Chafee's *Three Human Rights in the Constitution of 1787:*

> "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." (*Kent* v. *Dulles*, 357 U.S. 116, 126)
>
> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." (*Roe* v. *Wade*, 410 U.S. 113, 213, 214) Mr. Justice Douglas concurring.

The police department's administrative tribunal lacked jurisdiction in the case at bar, because the conduct alleged did not take place while the petitioner was on duty, nor did it bare any relationship to his official duties.

> "We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts." (*O'Callahan* v. *Parker*, 395 U.S. 258, 274)
>
> "We have concluded that the crime to be under mili-

EXHIBIT "H"

tary jurisdiction must be service connected, . . ." (*O'Callahan* v. *Parker, supra,* at 272)

Since the conduct alleged by the police department occurred while the petitioner was off duty, in private, and was not related to his work as a police officer, the conduct, if criminal, should have been referred to a court of law.

> "That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." (*O'Callahan* v. *Parker, supra,* at 265)

> "A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." (*O'Callahan* v. *Parker, supra,* at 266)

In *Gosa* v. *Mayden,* 413 U.S. 665 the Court affirmed the holding in the *O'Callahan* case making it prospective in application. The hearing in the case at Bar occurred after the Court rendered its decision in *Gosa* v. *Mayden.*

Although the police department is not a military organization nor does it compare, quasi or otherwise, with the military or a militia, its administrative tribunal acted as if it were a court-martial. It is for this reason, the petitioner requests the Court to apply the foregoing decisions to the case at Bar.

"Conduct unbecoming an officer;" "disorder or neglect of good order, efficiency or discipline;" "prejudicial to the good order and efficiency of the police department"—

EXHIBIT "H"

What do these phrases mean? They tend to explain some type of conduct. But what conduct? These vague and ambiguous phrases can be found in the Rules and Regulations of the Police Department, County of Nassau, New York, and in the charges and specifications against the petitioner. They have been carefully worded so as to state very little, mean so much, and defy comprehension. They are used as a "catch-all", a method of *ex post facto* prohibition readily available for use in all situations.

> As many decisions of this Court make clear, vague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due proces of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. As the Court put the matter in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U.S. 174, 176. Secondly, vague statutes offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 165-171. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109. The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure. *Parker* v. *Levy*, 417 U.S. 733, 774-775 (Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting).

EXHIBIT "H"

> . . . Men of common intelligence—including judges of both military and civil courts—must necessarily speculate as to what such terms as "conduct unbecoming an officer and a gentleman" and "conduct of a nature to bring discredit upon the armed forces" really mean. In the past, this Court has held unconstitutional statutes penalizing "misconduct," conduct that was "annoying", "reprehensible", or "prejudicial to the best interests" . . . In short, the general articles are in practice as well as theory *"catch-all" designed to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander . . . Parker* v. *Levy, supra,* at 776, 779. (Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting) (Emphasis supplied)

This Court has been extremely loath to disregard the rights of the citizenry regardless of their station in life. The determination of the State courts below that no constitutional issues were involved in this proceeding, or if they were of meager significance disregards and belies the very dignity of *"The Supreme Law of the Land"* which has been clearly, definitively announced and preserved by the decisional law of this Court which it is respectfully submitted, is completely contrary to (and flies in the face of) the attitude, the refusal, and the implied determination of the Court of Appeals of the State of New York with reference to the proceedings at bar.

The flagrant disregard of the petitioner's constitutional protections by the "Gestapo styled inquisition" of these so-called guardians of the public, cries out for correction by the highest Court in our nation, when the States permit such a travesty of justice to be protected from the light of justice and fair play.

EXHIBIT "H"

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES R. MOFFATT
Attorney for Petitioner
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

EXHIBIT "H"

Appendix "A"

The Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States

AMENDMENT 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT 4:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

EXHIBIT "H"

Appendix "A"

AMENDMENT 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

AMENDMENT 14, section 1:

(Adopted July 28, 1868)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, section 6

Constitution of the State of New York (as amended and in force January 1, 1969):

"(Grand Jury; protection of certain enumerated rights; waiver of immunity by public officers required.) —No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, of which this state may keep with the consent of congress in time

EXHIBIT "H"

Appendix "A"

of peace, and in cases of petit larceny, under the regulation of the legislature), unless an indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and *with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.* No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case *to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify,* or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law." (Emphasis supplied)

Section 255.17 of the Penal Law of the State of New York:

EXHIBIT "H"

Appendix "A"

Sec. 255.17 Adultery

"A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse."

Adultery is a class B misdemeanor. Added by L. 1965 ch. 1073, eff. September 1, 1967 (Gilbert Criminal Law and Procedure 1974 edition)

Section 8-13.0 of the Nassau County Administrative Code:

"Discipline and punishment. a. The commissioner shall have power to discipline a member of the force by:

1. Reprimand;
2. Fine;
3. Suspension, with or without pay;
4. Dismissal or removal from the force; or
5. Reducing him to any grade below that in which he was serving, if he be above the grade of patrolman, after which his compensation shall be the same as that allowed to members of the grade to which he is reduced.

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;
2. Neglect of duty;
3. Violation of rules;
4. Neglect or disobedience of order;
5. Incapacity;
6. Absence without leave;
7. Conduct injurious to the public peace or welfare;
8. Immoral conduct;
9. Conduct unbecoming an officer; or
10. Any other breach of discipline.

EXHIBIT "H"

Appendix "A"

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants, and patrolmen and to report his findings and recommendations to the commissioner for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense."

Section 8-22.0 of the Nassau County Administrative Code sec. 8-22.0 Duties of police department. It shall be the duty of the police department within the boundaries of the police district to:

. . .

"10. Enforce and prevent the violation of all laws and ordinances in force in such district; and for these purposes with or without warrant, to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crime and offenses."

(Nassau County Administrative Code Laws 1939, Chapter 272)

Rules and Regulations of the Office of Commissioner of Police, Police Department, County of Nassau, New York.

ARTICLE IX

Rules 8, 9, 10 and 11:

"Rule 8: *Departmental Procedure at Trial*

The accused shall be called.
The accused shall plead 'Guilty' or 'Not Guilty' to each specification.

The witnesses for the Department shall next be introduced in the order directed by the Trial Commissioner. Before testifying, the witness shall be sworn

EXHIBIT "H"

by the Trial Commissioner. The Department shall conduct the direct examination, at the conclusion of the direct examination, the witness shall be at the disposition of the accused for cross examination at the conclusion of the cross examination, the witness is subject to re-direct examination, followed by re-cross by the accused. After the witnesses for the Department have testified, the fact shall be communicated to the accused, and he shall then be permitted to proceed with his defense.

Each witness for the accused shall be sworn and his identity established, after which he shall be at the disposition of the accused. Following the direct examination by the accused, a witness is subject to cross-examination by the Department after which opportunity shall be given for re-direct followed by re-cross by the Department.

At the conclusion of the testimony offered by the witnesses for the accused, witnesses may be called by the Department in rebuttal. They are subject to cross-examination.

The accused shall then have an opportunity to introduce such other testimony as is competent and material, that he may desire.

The accused shall be given an opportunity to testify under oath in his own behalf, and be subject to cross-examination by the Department.

The accused and the Department shall be given a brief opportunity to sum up, or make pertinent motions.

The Trial Commissioner may, in his discretion, exclude from the trial room every person except the accused, his counsel, the prosecutor and counsel, the County Attorney, court clerk and stenographer.

Departure from any Departmental trial procedures shall not invalidate such proceedings unless it be con-

EXHIBIT "H"

clusively shown in writing, addressed and delivered to the Commissioner of Police, within twenty-four (24) hours after completion of the Department trial, that such departure adversely or injuriously affected the rights of the accused."

Rule 9:

"Rule 9. *Suspension*

Members of the Department may be suspended from duty whenever in the opinion of the Commissioner of Police such action is necessary.

1. Unless otherwise directed by the Commissioner of Police a member of the Department under suspension, shall report daily, in person, to his Commanding Officer at the office of his Command, or as otherwise directed by the Commissioner of Police; if above the rank of Lieutenant, he shall report, in person, daily to the Chief of Headquarters, Chief of Detectives or Chief of District.

2. Upon suspension, a member of the Department shall promptly surrender all departmental property, also his service revolver and any and all other revolvers and pistols possessed by him, which property shall be invoiced to the Property Bureau, and returned to the member when relieved from suspension.

3. During the period of suspension, a member of the Force shall not wear his uniform, nor any distinguishable part thereof, nor carry any police equipment.

4. When a member is suspended from the Department without pay, he may engage in another lawful business or calling during the period of suspension."

EXHIBIT "H"

Appendix "A"

Rule 10:

"Rule 10. A member of the Department found guilty of violating a rule or regulation of the Department, or of the provisions of any order or orders, or of disobedience of orders, or of cowardice, or of intoxication while on duty, or while in uniform, or *of conduct unbecoming an office*, or *of making a false official communication, record or statement*, or a member of the Department convicted in a court having criminal jurisdiction, may be dismissed from the Department, or suffer such other punishment as the Commissioner of Police may direct."

Rule 11:

"Rule 11. Disorder or neglect of good order, efficiency or discipline, though not specifically mentioned in these Rules and Regulations, shall be taken cognizance of by the Department, and members of the Department found guilty thereof will be punished, at the discretion of the Commissioner of Police." (Emphasis supplied)

EXHIBIT "H"

Appendix "B"

POLICE DEPARTMENT
COUNTY OF NASSAU, N. Y.

Charges and Specifications

Mineola, N. Y., ..., 19...

To the Commissioner of Police:

I hereby charge Sergeant GRIPPE, Daniel A., 102, First Precinct with: VIOLATING (1) ARTICLE IX, RULES 10 AND 11; (2) ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

SPECIFICATIONS:

in that 1. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did for approximately five years, between October 1968 and September 1973, act in a manner unbecoming an officer which was prejudicial to the good order and efficiency of the police department in that, he did carry on an intimate and illicit relationship with a female other than his wife.

2. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did, at, on or about 1600 hours on September 12, 1973, make a false communication in that, he did write in a report that "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department."

Complainant VINCENT J. REDICAN
Vincent J. Redican
Deputy Chief Inspector
Commanding Officer
First Division

EXHIBIT "H"

Appendix "B"

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

VINCENT J. REDICAN, being duly sworn, deposes and says; that he is a Deputy Chief Inspector and Commanding Officer of the First Division, and the complainant herein. That he has read the foregoing charges and specifications and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. That the sources of deponent's information are the books and records kept by the Police Department and the investigation made by the Police Department, County of Nassau, New York.

(Sworn to by Vincent J. Redican, September 13, 1973.)

EXHIBIT "H"

Appendix "C"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 15, 1974.

HON. JAMES D. HOPKINS

Acting Presiding Justice

HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER

Associate Justices

ORDER CONFIRMING DETERMINATION.

In the Matter of DANIEL A. GRIPPE,

Petitioner,

v.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

The above named Daniel A. Grippe, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR by a petition verified November 3, 1973, to review a determination of the respondent, dated October 22, 1973; respondent having filed an answer thereto; by order of the Supreme Court, Nassau County, dated December 12, 1973, the proceeding was transferred to this court for determination; and the proceeding having been submitted by James R. Moffat, Esq., of counsel for the petitioner and

EXHIBIT "H"

Appendix "C"

submitted by Ronald J. Morelli, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the proceeding is hereby dismissed on the merits and determination of respondent, dated October 22, 1973, confirmed, without costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

EXHIBIT "H"

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge presiding.

2 Mo. No. 20

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

An application for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said application be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk.

EXHIBIT "H"

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge presiding.

2 Mo. No. 20

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA,
Clerk.

EXHIBIT "H"

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of June A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge, presiding.

2 Mo. No. 443

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

A motion having heretofore been made upon the part of the appellant in the above cause to this Court for reargument of motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal, papers having been duly submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk of the Court.

EXHIBIT "I"

Section 8-13.0 of the Nassau County Administrative Code:

"Discipline and punishment. a. The commissioner shall have power to discipline a member of the force by:

1. Reprimand;
2. Fine;
3. Suspension, with or without pay;
4. Dismissal or removal from the force; or
5. Reducing him to any grade below that in which he was serving, if he be above the grade of patrolman, after which his compensation shall be the same as that allowed to members of the grade to which he is reduced.

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;
2. Neglect of duty;
3. Violation of rules;
4. Neglect or disobedience of order;
5. Incapacity;
6. Absence without leave;
7. Conduct injurious to the public peace or welfare;
8. Immoral conduct;
9. Conduct unbecoming an officer; or
10. Any other breach of discipline.

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants, and patrolmen and to report his findings and recommendations to the commissioner for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense."

"EXHIBIT I"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

RECEIVED AUG 0 9 1976

Plaintiff,

-against-

Civil Action File
No. 76C 1344

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU AND THE COUNTY OF NASSAU, NEW YORK,

NOTICE OF MOTION

Defendants.

----------X

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of LOUIS SCHULTZ, Senior Deputy County Attorney of Nassau County, duly sworn to on the 4th day of August, 1976, and upon the summons and complaint heretofore served herein, the Memorandum of Law being submitted herewith, and the exhibits attached hereto, the undersigned will move this Court at a Stated Term for Motions thereof, before JUDGE GEORGE C. PRATT, to be held at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on the 27th day of August, 1976, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 12(b) of the Federal Rules of Civil

Procedure, dismissing the complaint of the plaintiff and granting judgment in favor of the defendants on the grounds that:

(1) The Court lacks jurisdiction over the subject matter of this litigation and of the defendants herein;

(2) the matter has been completely adjudicated on the same issues in the Supreme Court of the State of New York, the Court of Appeals of the State of New York, and the Supreme Court of the United States of America; and

(3) there is a failure to state a claim upon which relief can be granted to the plaintiff in his complaint against the defendants; and

for such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York
August 4, 1976

Yours, etc.

JAMES M. CATTERSON, JR.
County Attorney of Nassau County
Attorney for Defendants

By_____
Louis Schultz
Senior Deputy County Attorney
Office and P.O. Address
Nassau County Executive Building
Mineola, New York 11501
Tel.: 516-535-3403

TO: SUTTER, MOFFATT, YANELLI
& ZEVIN, P.C.
Attorneys for Plaintiff
33 Willis Avenue
Mineola, New York 11501
Tel.: 516 PI 7-5800

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

Plaintiff,

-against-

Civil Action File
No. 76C 1344

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU AND THE COUNTY OF NASSAU, NEW YORK,

AFFIDAVIT

Defendants.

----------X

STATE OF NEW YORK)
) SS:
COUNTY OF NASSAU)

LOUIS SCHULTZ, being duly sworn, deposes and says:

1. I am a Senior Deputy County Attorney of Nassau County, associated with JAMES M. CATTERSON, JR., County Attorney of Nassau County, attorney for the defendants herein.

2. This affidavit is submitted in support of the motion to dismiss the complaint of the plaintiff on several grounds. The defendants contend that:

(a) The Court lacks jurisdiction over the subject matter of this litigation and of the defendants herein;

(b) the matter has been completely adjudicated on the same issues in the Supreme Court of the State of New York, the Court of Appeals of the State of New York, and the Supreme Court of the United States of America; and

(c) there is a failure to state a claim upon which relief can be granted to the plaintiff in his complaint against the defendants.

3. The defendants herein were served with copies of the summons and complaint in this action on July 20, 1976. The time to answer the complaint has not yet expired. That one of the copies of said summons and complaint with the exhibits annexed thereto will be furnished to the Court, together with the moving papers and memorandum of law.

4. Your deponent is fully familiar with all of the material facts pertaining to the disciplinary proceedings conducted against the plaintiff by the Nassau County Police Department in that your deponent appeared on behalf of said Nassau County Police Department and conducted said disciplinary trial; that your deponent is also familiar with the Article 78 proceedings commenced in the Supreme Court of the State of New York and heard in the Appellate Division of the Supreme Court of the State of New York, where the dismissal of the plaintiff by the Nassau County Police Commissioner, Louis J. Frank, was confirmed, from which decision of the Appellate Division of the Supreme Court

of the State of New York, motion for leave to appeal to the Court of Appeals was denied by the New York State Court of Appeals, and petition for Writ of Certiorari was denied by the Supreme Court of the United States of America. That your deponent is also fully familiar with all of the material facts from the papers, records, transcripts and documents in his possession, and makes this affidavit in support of the motion to dismiss the complaint on the grounds set forth above.

5. The plaintiff commenced this action against LOUIS J. FRANK as the former Commissioner of Police of the County of Nassau, New York, and against DANIEL P. GUIDO, the Successor and the Present Police Commissioner of the County of Nassau. Said defendants have been sued herein primarily and solely by reason of the fact that the defendant, LOUIS J. FRANK, as Police Commissioner of the Nassau County Police Department, dismissed the plaintiff from the Nassau County Police Department after a disciplinary trial, and that DANIEL P. GUIDO, is the present Police Commissioner of the Nassau County Police Department. There is no claim or allegation in the complaint concerning any act committed by the said LOUIS J. FRANK or by DANIEL P. GUIDO in their respective individual capacities. There is no allegation in the complaint concerning the defendant, DANIEL P. GUIDO, except for the fact, that as alleged in Paragraph "5" of the

complaint that DANIEL P. GUIDO is the present Commissioner of Police.

6. This suit is brought under 42 U.S.C. §1983 with jurisdiction predicated on 28 U.S.C. § 1343(3) to redress plaintiff's deprivation of rights, privileges and immunities secured by the Constitution of the United States of America, as alleged in the complaint, and for an alleged violation of his constitutional rights. The plaintiff, a former Police Officer in the Nassau County Police Department, holding the rank of Sergeant, was dismissed after a disciplinary trial on October 22, 1973. That the charges and specifications in connection with said disciplinary trial are set forth and made part of plaintiff's summons and complaint, and identified as "Exhibit A".

7. The plaintiff in Paragraphs "27" and "28" of his complaint, sets forth the basis and background for the charges and specifications preferred against the plaintiff in said disciplinary proceeding, except that Specification No. 2 relates solely to the manner in which the plaintiff made out his official report. By reason of the fact that he set forth in his written report that he had been directed to do so under the penalty of dismissal, he was charged with submitting a false report.

8. All of the facts relating to the disciplinary trial and the testimony offered by the plaintiff at said

disciplinary trial to the effect that adultery no longer offends the mores or the conscience of the community, are fully set forth in plaintiff's complaint and in his petition in his Article 78 proceeding, copy of which was attached to his complaint. It is of interest to note that in Paragraph "15" of the complaint, plaintiff alleges that the Trial Commissioner recommended to the Commissioner of Police that petitioner be found guilty on the charges and specifications and that he be dismissed from the Police Force. That attached hereto and made a part hereof and identified as "Exhibit "1" is a copy of the determination made by Deputy Chief Inspector Frank E. Klecak, taken from plaintiff's record on appeal to the Appellate Division of the Supreme Court on his appeal from his dismissal as a Nassau County Police Officer. Said determination by said Trial Commissioner clearly indicates that the said Trial Commissioner recommended to the Commissioner of Police of the Police Department, County of Nassau, New York, that Sgt. Daniel A. Grippe be found guilty of Specifications No. 1 and No. 2, as charged, and that the Commissioner of Police impose such disciplinary action as he shall deem fit and proper. There was no recommendation of dismissal as alleged in Paragraph "15" of the complaint.

9. In Paragraph "16" of the complaint, plaintiff refers to "cursory findings of fact" made by the Commissioner of Police, and he attaches to his complaint which he marked as "Exhibit B", the determination of the Police Commissioner. That attached hereto, made a part hereof and identified as "Exhibit 2" is a copy of the Disposition of Charges made by the Commissioner of Police, which was marked as "Exhibit I" in the answer interposed on behalf of said Police Commissioner in the New York State Article 78 Procedure, which contained, among other things, the previous disciplinary record of the plaintiff. In addition thereto, there is also attached hereto and made a part hereof, the determination made by the Commissioner of Police in the matter of the charges against Sgt. Daniel A. Grippe, and is identified as Exhibit "3"; said exhibit was marked as "Exhibit J" in the Article 78 Proceeding.

10. Plaintiff has clearly indicated in his complaint and in the exhibits annexed thereto, that after he was dropped from the rolls of the Nassau County Police Department on October 22, 1973, that he commenced a proceeding in the Supreme Court of the State of New York, County of Nassau, pursuant to the provisions of Article 78 of the New York State Civil Practice Law and Rules, wherein he claimed in Paragraph "12"

of his petition in said Article 78 proceeding, that his constitutional rights had been violated and that the punishment imposed upon him was excessive, together with other allegations made by him in said petition. That the said Article 78 proceeding was duly and legally transferred to the Appellate Division of the Supreme Court, Second Department. In Paragraph "19" of the complaint of the plaintiff, it is alleged that the said Appellate Division of the Supreme Court of the State of New York, Second Department "wholly failed to review and consider the unfair hearing below, the deprivation of plaintiff's constitutional rights, the deprivation of his civil rights", together with several other charges made in said complaint by the plaintiff against the said Appellate Division of the Supreme Court. As a member of the Bar of the State of New York, I take exception to such attack on the Appellate Division of the Supreme Court, as well as what appears to be a further attack upon the Court of Appeals in Paragraph "21" of the complaint, where it is alleged that the said Court of Appeals "exercising its purported discretion" denied plaintiff's request for leave to appeal from the Order of the Appellate Division. The Appellate Division having confirmed the Order of Dismissal of the plaintiff from the Nassau County Police Department, and having dismissed the Article 78 proceedings on the merits as is indicated by "Exhibit D" annexed to the complaint, the appeal to the New York State

Court of Appeals was dismissed upon the ground that no substantial constitutional question was directly involved, as is indicated by "Exhibit E" annexed to the complaint. It appears from Paragraph "23" of the complaint that plaintiff's petition to the Supreme Court of the United States of America for a Writ of Certiorari was denied by the said Supreme Court of the United States of America because the granting of the petitioner's Writ of Certiorari would simply waste the time of the highest court of this county, by requiring it to merely reiterate and recite its prior decisional law and construction of the Constitution of the United States of America. If that is the interpretation of the plaintiff in connection with the denial by the Supreme Court of the United States of America to the granting of a Writ of Certiorari, then it is apparent that he now seeks to waste the time of this Court, which should not be tolerated.

11. It is, therefore, quite apparent that the plaintiff in his previous Article 78 proceedings, which was litigated through the Supreme Court of the State of New York, the Appellate Division of the Supreme Court, Second Department, the New York State Court of Appeals and the Supreme Court of the United States of America, actually litigated the same constitutional questions now being presented to this Court as a basis for his civil rights suit. On Page 5 of the affidavit of James R. Moffatt, attorney

for the plaintiff, in support of his motion for reargument before the Court of Appeals, copy of which is attached to the complaint of the plaintiff, Mr. Moffatt urged that plaintiff's rights under the Fifth and Sixth Amendments of the Constitution of the United States had been violated. In his petition for Writ of Certiorari before the Supreme Court of the United States of America, copy of which is attached to the complaint, plaintiff urges that his rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constition of the United States had been violated. The constitutional issue was, therefore, actually raised by the plaintiff in his State Court proceedings. He has made his choice and as has been stated by the courts, he may not have two bites at the cherry. The State courts were competent to decide the question raised by the plaintiff with regard to the alleged constitutional question as it pertained to the interrogation of the plaintiff by his superior officers, the making of his original written report and the receipt of his report in evidence during his disciplinary trial which was objected to on constitutional grounds.

12. As has been stated in previous decisions rendered by the Federal Courts, the Federal Courts are not granted exclusive jurisdiction to enforce constitutional rights. Since the question of plaintiff's constitutional rights have been fully

litigated in the State Courts, there is no compelling Federal interest in this case which militates against according res judicata effect to the confirmation of the determination made by the Police Commissioner of the Nassau County Police Department by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the New York State Court of Appeals. The only purpose attempted by the plaintiff for the commencement of this action is to seek to have this Court relitigate his alleged Federal claim, which was presented to and decided by the Appellate Division of the Supreme Court of the State of New York and by the New York State Court of Appeals. The plaintiff, therefore, has no right to seek direct review of the State Court decisions in this Court. To permit the plaintiff to do so would give to this Court the right to Appellate Jurisdiction in this matter over the decisions of the State Courts. The jurisdiction possessed by the United States District Court is strictly original. The State provided an adequate means for the vindication of the plaintiff's constitutional interests and plaintiff's claim in the State Courts that he had been deprived of such constitutional interests was in all respects rejected.

13. There is no allegation in the complaint of any act committed by the defendant, LOUIS J. FRANK as Police

Commissioner of the Nassau County Police Department, except for his approval of the determination made by the Trial Commissioner and ordering the dismissal of the plaintiff from the Nassau County Police Department on October 22, 1973. Such conduct on the part of the defendant, LOUIS J. FRANK, in his official and representative capacity of Police Commissioner, is in no way a violation of the constitutional or civil rights of the plaintiff. Plaintiff is seeking money damages against the defendants in his complaint to the extent that the plaintiff seeks to hold the defendant, LOUIS J. FRANK, as Police Commissioner, liable for damages under § 1983, in his official capacity as Police Commissioner. Such a suit is in actuality one against the County. Although the Nassau County Police Department is not named as a defendant in the title of the action, it is identified as a party in Paragraph "6" and elsewhere in the complaint. COUNTY OF NASSAU, NEW YORK, is mentioned and identified as a party to this suit. Neither the Nassau County Police Department nor the County of Nassau are "such persons" as was intended by the provisions of Title 42, U.S.C. § 1983, for which reason plaintiff's complaint should be dismissed as against said corporate defendants. There is no allegation concerning any action committed by the defendant, DANIEL P. GUIDO, the Successor

and Present Commissioner of the Police Department of the County of Nassau. The complaint should, therefore, be dismissed as against the said defendant, DANIEL P. GUIDO, the Successor and Present Commissioner of the Police Department of the County of Nassau, for the same reason, and for the reason set forth above, the complaint should also be dismissed as against the defendant, LOUIS J. FRANK, the former Commissioner of Police of the County of Nassau.

14. The complaint of the plaintiff fails to indicate that this Court has jurisdiction over the subject matter, nor does it show that any constitutional or civil rights of the plaintiff were in any way violated, and plaintiff in his complaint, fails to state a claim for which relief can be granted.

WHEREFORE, your deponent respectfully requests that the complaint of the plaintiff be dismissed on the grounds set forth in the Notice of Motion and spelled out in the within affidavit, which is further supported by the accompanying memorandum of law, and your deponent further requests such other and further relief on behalf of the defendants as to the Court may seem just and proper.

Louis Schultz

Sworn to before me this
4th day of August, 1976.

Notary Public

Exhibit H, Determination and Determination, Annexed to Answer.

Case Number 3869

Trial Commissioner
Deputy Chief Inspector
Frank E. Klecak

POLICE DEPARTMENT, COUNTY OF NASSAU

IN THE MATTER OF CHARGES

—against—

SERGEANT DANIEL A. GRIPPE

Charges of Violating Article IX, Rules 10 and 11, of the Rules and Regulations of the Police Department, County of Nassau, New York, having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, dated September 13, 1973 by Deputy Chief Inspector Vincent J. Redican, Commanding Officer, First Division, and said charges having been served on Daniel A. Grippe on the 13th day of September 1973, and said Daniel A. Grippe having appeared before the Trial Commissioner, Inspector Christopher P. Quinn, on September 18, 1973 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said Daniel A. Grippe was subsequently held on said Charges and Specifications before the undersigned. Deputy Chief Inspector Frank E. Klecak, who was duly designated Trial Commissioner by order of the Commissioner of police

dated April 7, 1972, and said Daniel A. Grippe having been represented by his attorney, James Moffatt, Esq. and complainant having been represented by Joseph Jaspan, County Attorney of Nassau County; Louis Schultz, Esq., Senior Deputy County Attorney, of Counsel, and after hearing the proof and evidence of the parties, Deputy Chief Inspector Frank E. Klecak hereby determines and recommends:

DETERMINATIONS

Specification Number 1.: Substantial evidence was presented at the trial to prove that Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did, for approximately five years, between October 1968 and September 1973, act in a manner unbecoming an officer and prejudicial to the good order and efficiency of the Police Department by carrying on an intimate and illicit relationship with a female not his wife. THIS IN VIOLATION OF ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 2.: Substantial evidence was presented at the trial to prove that Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did, at, on, or about 1600 hours on September 12, 1973, make a false communication by writing in a report that "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department." THIS IN VIOLATION OF ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Exhibit H, Determination and Determination, Annexed to Answer.

RECOMMENDATION

After careful consideration of the testimony, proof and evidence in this case, it is recommended to the Commissioner of Police of the Police Department, County of Nassau, New York that Sergeant Daniel A. Grippe be found guilty of Specifications 1 and 2, as charged and that the Commissioner of Police impose such diseiplinary action as he shall deem fit and proper.

FRANK E. KLECAK
Frank E. Klecak
Deputy Chief Inspector
Trial Commissioner

Dated at Police Headquarters
Mineola, New York
October 18, 1973

Exhibit I, Disposition of Charges, Annexed to Answer.

HEADQUARTERS

POLICE DEPARTMENT, COUNTY OF NASSAU

COMMISSIONER'S ORDER NUMBER 52

MINEOLA, NEW YORK
OCTOBER 22, 1973

Disposition of Charges

Case Number 3869 — **Grippe, Daniel A., Sergeant, Shield Number 102 Serial Number 2798, First Precinct**

Charges of Violating Article IX, Rules 10 and 11, of the Rules and Regulations of the Police Department, County of Nassau, New York having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, dated September 13, 1973 by Deputy Chief Inspector Vincent J. Redican, Commanding Officer, First Division, and said charges having been served on Daniel A. Grippe on the 13th day of September 1973 and said Daniel A. Grippe having appeared before Trial Commissioner Inspector Christopher P. Quinn on September 18, 1973 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said Daniel A. Grippe was held on said Charges and Specifications before Deputy Chief Inspector Frank E. Klecak, who was duly designated Trial Commissioner by order of the Commissioner of Police dated April 7, 1972 and said Daniel A. Grippe having been represented by his attorney, James Moffat, Esq., and Frank E. Klecak, Trial Commissioner having heard the pleadings and the proof and evidence of

the parties, and having filed with Louis J. Frank, Commissioner of Police, his determinations and recommendations dated October 18, 1973, and the said Louis J. Frank, Commissioner of Police of the Police Department, County of Nassau, New York, having reviewed the said charges against Daniel A. Grippe, the evidence as contained in the record of the trial and the determinations and recommendations of Deputy Chief Inspector Frank E. Kleeak, Trial Commissioner, it is

ORDERED, that the Commissioner of Police of the Police Department, County of Nassau, New York, does hereby approve and confirm the determinations and recommendations of the Trial Commissioner and finds Sergeant Daniel A Grippe guilty of Specification Numbers 1 and 2 as charged.

And it further appearing from the personnel record of said Sergeant Grippe that he was previously convicted of eight charges and specifications, to wit:

Date	*Charge*	*Disposition*
November 29, 1972	Failed to obey lawful orders, instructions and directions of a superior officer	Fined 15 days pay
December 2, 1972	Failed to assist members under his supervision in the discharge of their duties	Fined 5 days pay
December 2, 1972	Failed to maintain an accurate record in his memorandum book	Reprimand
December 2, 1972	Failed to record in his memorandum book all duties performed	Reprimand

Exhibit I, Disposition of Charges, Annexed to Answer.

Date	*Charge*	*Disposition*
December 2, 1972	Making sexual proposals to a seventeen year old female	Fined 15 days pay
December 2, 1972	Making false statements to a superior officer	Fined 5 days pay
December 2, 1972	Permitting a female private person to enter a departmental vehicle without being so directed and not on official police business	Fined 5 days pay
January 25, 1973	Failed to obey the lawful orders, instructions and requests of a superior officer	Reprimand

IT IS FURTHER ORDERED, that Daniel A. Grippe, Sergeant, Shield Number 102, First Precinct, Serial Number 2798, be dismissed from his position of Sergeant in the Police Department, County of Nassau, New York, and that his name be dropped from the rolls of said Police Department, as of the 22nd day of October 1973 at 2400.

LOUIS J. FRANK
Louis J. Frank
Commissioner of Police

LJF:gmd

Exhibit J, Determination Made by Commissioner of Police.

POLICE DEPARTMENT,

COUNTY OF NASSAU

Case Number 3869
October 22, 1973

IN THE MATTER OF CHARGES

—against—

SERGEANT DANIEL A. GRIPPE

Charges of Violating Article IX, Rules 10 and 11, of the Rules and Regulations of the Police Department, County of Nassau, New York having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, dated September 13, 1973, by Deputy Chief Inspector Vincent J. Redican, Commanding Officer, First Division, and said charges having been served on Daniel A. Grippe on the 13th day of September 1973, and said Daniel A. Grippe having appeared before Trial Commissioner Inspector Christopher P. Quinn on September 18, 1973 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said Daniel A. Grippe was held on said Charges and Specifications before Deputy Chief Inspector Frank E. Klecak, who was duly designated Trial Commissioner by order of the Commissioner of Police dated April 7, 1972 and said Daniel A. Grippe, having been represented by his attorney, James

Exhibit J, Determination Made by Commissioner of Police.

Moffatt, Esq. and Frank E. Klecak, Trial Commissioner having heard the pleadings and the proof and evidence of the parties, and having filed with Louis J. Frank, Commissioner of Police, his determinations and recommendations dated October 18, 1973, and the said Louis J. Frank, Commissioner of Police of the Police Department, County of Nassau, New York having reviewed the said charges against Daniel A. Grippe, the evidence as contained in the record of the trial and the determinations and recommendations of Deputy Chief Inspector Frank E. Klecak, Trial Commissioner, it is

ORDERED, that the Commissioner of Police of the Police Department, County of Nassau, New York, does hereby approve and confirm the determinations and recommendations of the Trial Commissioner and finds Sergeant Daniel A. Grippe guilty of Specifications Numbers 1 and 2 as charged. And it further appearing from the personnel record of said Sergeant Grippe that he was previously convicted of eight charges and specifications, to wit:

Date	*Charges*	*Disposition*
November 29, 1972	Failed to obey lawful orders, instructions and directions of a superior officer	Fined 15 days pay
December 2, 1972	Failed to assist members under his supervision in the discharge of their duties	Fined 5 days pay
December 2, 1972	Failed to maintain an accurate record in his memorandum book	Reprimand
December 2, 1972	Failed to record in his memorandum book all duties performed	Reprimand
December 2, 1972	Making sexual proposals to a seventeen year old female	Fined 15 days pay

Exhibit J, Determination Made by Commissioner of Police.

Date	*Charges*	*Disposition*
December 2, 1972	Making false statements to a superior officer	Fined 5 days pay
December 2, 1972	Permitting a female private person to enter a departmental vehicle without being so directed and not on official police business	Fined 5 days pay
January 25, 1973	Failed to obey the lawful orders, instructions and requests of a superior officer	Reprimand

IT IS FURTHER ORDERED, that Daniel A. Grippe, Sergeant, Shield Number 102, First Precinct, Serial Number 2798, be dismissed from his position of Sergeant in the Police Department, County of Nassau, New York, and that his name be dropped from the rolls of said Police Department as of the 22nd day of October 1973 at 2400.

LOUIS J. FRANK
Louis J. Frank
Commissioner of Police

Dated at Police Headquarters

Mineola, New York

October 22, 1973

County's Exhibit 1, Charges and Specifications.

(Same as Exhibit A, Annexed to Petition.)

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-376

DANIEL A. GRIPPE,

Petitioner,

V.

LOUIS J. FRANK,

COMMISSIONER OF POLICE, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinion Below (There were no opinions delivered in the Courts below)	1
Jurisdiction	1
Questions Presented	2
Statement of Facts	3
POINT I—The failure of Hester J. Jerome to testify at the disciplinary hearing should not require reversal in that no substantial constitutional question is directly involved	5
POINT II—Petitioner had no right to be represented by counsel during the course of an investigation by Police Commissioner of Nassau County	9
POINT III—Petitioner, formerly a police officer in the Nassau County Police Department, may properly be made to account for his actions	12
POINT IV—The Rules and Regulations of the Nassau County Police Department are not vague or ambiguous, and do not fail to indicate proscribed conduct so as to violate the due process clause of the Fourteenth Amendment to the United States Constitution	15
Conclusion—The petition for a writ of certiorari should be denied	18

TABLE OF CASES

Page

Anonymous Nos. 6 and 7 v. *Baker*
360 U.S. 287, 3 L. Ed.2d 1234,
79 S. Ct. 1157 (1959) 10

Application of Delehanty 202 Misc. 22, aff'd, 280 App.
542, 304 N.Y. 725 (1952) 11

Bachorik v. *Allied Control Co.*
34 A.D.2d 940, 312 N.Y.S.2d 272,
(1st Dept. 1970) 13,14

Bowles v. *Baer*, 142 F.2d 787 (7th Cir. 1944) 9

Cacchioli v. *Hoberman*, 31 N.Y.2d 287,
338 N.Y.S.2d 865 (1972) 13

Coates v. *City of Cincinnati*
402 U.S. 611, 614, 91 S. Ct. 1686, 1688,
29 L.Ed. 2d 214 (1971) 16

Confederation of Police v. *Conlisk*
489 F.2d 891 (7th Cir. 1973) 13

Connally v. *General Construction Co.*
269 U.S. 385, 391, 46 S. Ct. 126, 127,
70 L.Ed. 322 (1926) 15

Fletcher v. *United States*, 28 Ct. Cl. 173 (1893) 12

Gardner v. *Broderick*, 392 U.S. 273 (1968) 12

Gardner v. *Board of Public Works*
341 U.S. 716 (1950) 12

Garrity v. *New Jersey*, 385 U.S. 493 (1967) 12

Grayned v. *City of Rockford*,
408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298,
2299, 33 L.Ed. 2d 222 (1972) 15

Greene v. *McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959) 6

Grippe v. *Frank*, 46 A.D.2d 848, 362 N.Y.S. 1010 (1974) aff'd 36 N.Y.2d 713 (1975) 1

Kalkines v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973) 13

Kirby v. *Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972) 9,11

Kraus & Bros. v. *United States*, 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 (1946) 15

Madera v. *Board of Education of the City of New York*, 386 F.2d 778 (2d Cir. 1967) 10

Matter of Heckt v. *Monaghan*, 307 N.Y. 461 (1954) 8

STEWART v. LEAHY
Matter of Marti, 57 Misc.2d 793 (196?) 17,18

McCune v. *Frank*, Court of Appeals for Second Circuit, #75-7027, (1975), motion for stay denied by Honorable Thurgood Marshall, Justice of the United States Supreme Court, 9/15/75 7

Miranda v. *Arizona*, 384 U.S. 436 11

Nason v. *Immigration and Naturalization Service*, 379 F.2d 856 (2d Cir. 1967) 10

Parker v. *Levy*, 417 U.S. 733, 41 L.Ed. 2d 439, 94 S.Ct. 2547 (1974) 16,17

Re Grahan, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957) 9

Uniformed Sanitation Men Assoc. v. *Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) 12

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-376

DANIEL A. GRIPPE,

Petitioner,

V.

LOUIS J. FRANK,
COMMISSIONER OF POLICE, POLICE DEPARTMENT,
COUNTY OF NASSAU, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The citation of the New York State Court of Appeals is reported at 36 N.Y. 2d 713 (1975), which cited 46 A.D. 2d 848, (362 N.Y.S. 2d 1010 (2nd Dept. 1974)). The subsequent motion of petitioner for reargument of the motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal denied by the Court of Appeals by order dated June 16, 1975 as yet unreported, is found in petitioner's petition at page 15 a entitled Appendix "D".

Jurisdiction

The orders of the New York State Court of Appeals were entered in two separate orders entered February 12, 1975 petitioner's petition 14 a, and the subsequent order

entered June 16, 1975, petitioner's petition 15 a. The petition for writ of certiorari was filed on September 9, 1975. The jurisdiction of this Court is invoked under Rule 19(a) of said Court.

Questions Presented

1. Whether the petitioner had no opportunity to confront his only accuser?

Whether hearsay evidence may be admitted in a disciplinary proceeding?

3. Whether petitioner is required to be represented by counsel at the investigatory stage of a Police Department internal investigation which subsequently develops into a desciplinary proceeding?

4. Whether a report from a police officer to his superior officer was violative of his right to privacy concerning a matter under investigation relating to said police officer?

5. Whether the enforcement Rules & Regulations of the Nassau County Rules & Regulations are vague and ambiguous?

6. Whether a police officer's extramarital relationships are a proper subject for a police disciplinary proceeding?

7. Whether petitioner has presented a substantial constitutional question which is directly involved in his appeal?

Statement of Facts

On September 4, 1973, Daniel A. Grippe (hereinafter petitioner or petitioner Grippe), a sergeant in the Nassau County Police Department, went to see his commanding officer, Inspector DeBeche, Commander of the First Precinct. In the conversation that followed, petitioner Grippe revealed that he had been involved in an extramarital affair for "...the last couple of years..." (R. 184).*Approximately one-half hour after this conversation, the woman with whom petitioner Grippe was involved, a Mrs. Hester Jerome, arrived at the office of Inspector DeBeche. Mrs. Jerome proceeded to explain her illicit relationship with the petitioner (R. 186). Both petitioner and Mrs. Jerome freely volunteered information relating to their affair to Inspector DeBeche.

As a result of the two aforementioned conversations on September 4, 1973 in which both petitioner and his paramour revealed their illicit affair to Inspector DeBeche, and one further conversation on September 5, 1973 in which Mrs. Jerome recounted to Chief Redican, Commanding Officer of the First Division, her relationship with petitioner, Chief Redican was placed in charge of an internal investigation with regard to the alleged conduct of Petitioner. Chief Redican's investigation substantiated the substance of the conversations of September 4th and 5th. The investigation turned up motel registration stubs revealing that petitioner and Mrs. Jerome shared a motel room during a P.B.A. convention, that she accompanied him to Boston in April of 1972 for a sociology convention, and that they took a trip together to Kentucky in August, 1973 to visit Mrs. Jerome's family. (County Exhibits 5A-J, 6A-J, 9, 10 and 11 of the Record).

As part of the investigation, Petitioner Grippe was called to the office of the Chief of District on September

(R. — Record on Appeal unless otherwise indicated)

12, 1973. Pursuant to Section 6(b) of the contract between the County of Nassau and the P.B.A., Petitioner had a P.B.A. representative present during his interview. This representative was P.B.A. President, Cliff Schmidt. During the interview, petitioner gave a full and complete report of his relationship with Mrs. Jerome. In his report, petitioner falsely stated that he was being compelled to write the report under threat of losing his job. Petitioner made this statement in spite of the fact that the Nassau County Administrative Code makes clear that only the Commissioner of Police can dismiss an officer, and only after there has been a disciplinary proceeding. At the conclusion of the interview, P.B.A. President Schmidt was asked if there was anything improper during the interview, or if at any time petitioner was threatened with the loss of his job. President Schmidt stated that there was nothing improper in the interview, and that there were no threats, with the exception of a statement to Petitioner that he could be properly suspended, if he didn't write his report. (R. 130-136)

On September 13, 1973, petitioner was served with charges and specifications stating he violated Article IX, Rules 10 and 11, of the Rules and Regulations of the Police Department. The Specifications stated that petitioner (1) acted in a manner unbecoming an officer by carrying on an intimate and illicit relationship with a female other than his wife, and (2) that Petitioner made a false communication in his report when he stated he was being compelled to write the report under threat of losing his job (R. 13a-14a).

From October 2, 1973 to October 5, 1973, a disciplinary hearing was conducted at Nassau County Police Headquarters. Upon the recommendation of the trial commissioner, and after his own study of the case, the Commissioner of Police, Louis J. Frank (hereinafter respondent or respondent Frank) found petitioner guilty of the charges and specifications and ordered him dismissed from the Police Department. It should be pointed out that respondent, in his decision, mentioned petitioner's prior

disciplinary involvement. (R. 17a) On February 7, 1973, Petitioner had been found guilty of, among other charges, making sexual proposals to a 17 year old female, and permitting a female private person to enter a Department vehicle without being so directed, and not on official police business. (R 32a-33a, 36a-38a)

A proceeding was commenced in New York State Supreme Court, Nassau County on November 19, 1973 by the service of a Notice of Petition and Verified Petition with an Answer being served on January 28, 1974. The petitioner requested Article 78 Review of respondent's determination dismissing him. The proceeding was duly transferred to the Appellate Division, Second Department, which affirmed the determination of the Trial Commissioner and the decision of Commissioner Frank. (46 A.D.2d 818, 1974). Motion for leave to appeal was denied by the Court of Appeals (36 N.Y.2d 713, 1975), as was the motion of petitioner for reargument (order dated June 15, 1975 and as yet unreported.)

On September 9, 1975, petitioner filed an application to this Court for a writ of certiorari to review the within proceedings.

POINT I

The failure of Hester I. Jerome to testify at the disciplinary hearing should not require reversal in that no substantial constitutional question is directly involved.

Petitioner contends in page 1 of his petition for a writ of certiorari that "the petitioner had no opportunity to confront his only accuser...". Of course this is not the case, because Hester I. Jerome is not the accuser in the case at bar. In this disciplinary proceeding, the accuser or complainant was Vincent J. Redican, Deputy Chief Inspector of the Nassau County Police Department (see page 9A, 10A Appendix "B").

It is clear from a reading of the record that Daniel A. Grippe's report, as well as other evidence uncovered by the Police Department, resulted in his being found guilty of breach of disciplinary rules and regulations. In essence, petitioner's own report and testimony alone were sufficient to establish guilt. It is no longer conjecture as to whether Mrs. Jerome's testimony was necessary to the respondent's case, because of the insurmountable evidence against petitioner in the record.

The case of *Greene* v. *Mc Elroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400, (1959), which petitioner cites, is distinguishable in that petitioner herein could readily confront and question the Nassau County Police Investigators who took Mrs. Jerome's statement. Reports relevant to the disciplinary hearing were readily available to petitioner. The most glaring and distinguishing characteristic in the instant case as compared to the Greene case, is that petitioner's own report and statements as well as other relevant and material evidence bearing on his conduct and activities ultimately resulted in finding him guilty with respect to the charges made against him.

In any event, petitioner's attorney could have taken steps to properly protect his client in the event petitioner's attorney determined that petitioner required Mrs. Jerome as necessary to his case. This is especially true since counsel for the petitioner insisted that the County produce Mrs. Jerome for confrontation and cross-examination (R. 76). Senior Deputy County Attorney Louis Schultz stated that he was going to have this subpoenaed witness cited for contempt, upon the conclusion of this proceeding if not sooner, to punish Mrs. Jerome for contempt of court (R. 78). At this point in time, petitioner's attorney could have, but did not request the Trial Commissioner to take any additional or further steps to compel Mrs. Jerome's appearance pursuant to Section 2308(b) of the New York Civil Practice Law and Rules with respect to obedience of non-judicial subpoenas.

There were other possible remedies available to petitioner, if he thought it necessary, by instructing his attorney to move in the Supreme Court of the County of Nassau for a stay of all proceedings pending the presence and testimony of Mrs. Jerome, or for an order on good cause shown requiring the Police Commissioner of Nassau County to enforce the previously issued judicial subpoena by application to the Court, as provided in New York CPLR 2308(b), or in the extreme, for a writ of prohibition pursuant to Article 78 of the New York CPLR.

In addition, petitioner through his attorney could have gone to the federal courts to enjoin the pending county disciplinary proceedings, if he determined that extraordinary circumstances required it to protect his client's interests. See: *Younger* v. *Harris*, 401 U.S. 37 (1971), and the companion case of *Younger, Samuels* v. *Mackell*, 401 U.S. 66 (1971)

In *McCune* v. *Frank*, U.S. Court of Appeals for the Second Circuit, Docket #75-7027, (1975) and motion by McCune for stay denied by the Honorable Thurgood Marshall, Justice, United States Supreme Court, on September 15, 1975, the Circuit Court stated, at page 4882:

> "That we are dealing with a county police department's disciplinary proceeding rather than a state court action is of little moment. A proceeding in a state court is not a prerequisite to the applicability of *Younger*. *Schlesinger* v. *Councilman*, *supra*; *Geiger* v. *Jenkins*, 401 U.S. 985 (1971), *aff'g. mem.*, 316 F. Supp. 370 (N.D. Ga. 1970). *Geiger* establishes that *Younger* has relevance to administrative proceedings, *see Anonymous* v. *Association of the Bar*, *supra*. F.2d , at n. 3, slip op. 2715 at 2724-25 n.3, and the explanation of *Geiger* in *Gibson* v. *Berryhill*, 411 U.S. 564, 576-77 (1973), indicates that this applicability is subject to considerations similar to those subsequently enunciated in *Huffman*, *supra*, and *Anonymous* v. *Association of the Bar*, *supra*."*

*The citations for the two companion Anonymous Cases are 515 F 2d 427, and 515 F 2d 435, (2d Circuit1975).

In summation, the petitioner pursued none of these adequate remedies at law to protect himself, and therefore it is fair to conclude that he was left to the State courts.

It should also be noted that in administrative hearings such as disciplinary hearings, hearsay testimony is admissible, provided other competent evidence is submitted. Such was the case in the instant proceedings. The following quotation from *Matter of Hecht* v. *Monaghan*, 307 N.Y. 461 (1954) on the informality and the disregarding of technical and legal rules of procedure is well stated.

> "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal (see *Matter of Friedel* v. *Board of Regents*, 296 N.Y. 347, 352-353; *Matter of Heaney* v. *McGoldrick*, 286 N.Y. 38, 45; *People ex rel. Hirschberg* v. *Board of Supervisors*, 251 N.Y. 156, 172; *Matter of Greenebaum* v. *Bingham*, 201 N.Y. 313, 347; *Morgan* v. *United States*, 304 U.S. 1, 18-19; *West Ohio Gas Co.* v. *Commission* [*No. 1*], 294 U.S. 63, 70-71; *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 339-340; *Kwock Jan Fat* v. *White*,, 253 U.S. 454, 463-464; *Interstate Commerce Comm.* v. *Louisville & Nashville R.R.*, 227 U.S. 88, 93-94)."

It is submitted that no substantial constitutional question is directly involved, and the petition for a writ of certiorari should be dismissed.

POINT II

Petitioner had no right to be represented by counsel during the course of an investigation by the Police Commissioner of Nassau County.

The Sixth Amendment to the United States Constitution provides for the assistance of counsel to the accused in all criminal prosecutions, and is subject to the "criminal prosecution" limitation stated in said amendment, and as a result, has no bearing on the question whether there is a right to counsel in administrative proceedings.

It is established that there is no constitutional right to the assistance of counsel at the investigatory stage. *Bowles v. Baer*, 142 F.2d 787 (7th Cir. 1944). The Court in *Kirby v. Illinois* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) stated,:

> *"In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. [illegible], 84 ALR 527, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."* at 32 L.Ed. 2d 417.

It is clear in the case at bar a right to counsel at the investigatory stage is not authorized by any statute, regulation or specific constitutional provision. In the case of *Re Groban*, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957), a right to counsel under the due process clause was denied to a witness at a state fire marshal's investigation into the cause of a fire, notwithstanding that the witness was under suspicion. The Supreme Court, in *Re Groban*, concluded that the fact that witnesses at the investigation were under a legal duty to speak, and that their testimony might provide a basis for criminal charges against them, did not

mean that they had a constitutional right to the assistance of counsel; such witnesses, it was pointed out, have the protection of the privilege against self-incrimination and, until evidence obtained in such investigation gives rise to a criminal charge, only the self-incrimination privilege is available.

This rule also finds support in cases involving preliminary examinations in deportation proceedings, *Nason* v. *Immigration and Naturalization Service*, 370 F.2d 856 (2d Cir. 1967), as well as other investigations preliminary in nature. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 3 L.Ed. 2d 1234, 79 S.Ct. 1157 (1959). See also *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Madera* v. *Board of Education of the City of New York*, 386 F. 2d 778 (2d Cir. 1967); *United States* v. *Neves*, 269 F.Supp. 158 (S.D.N.Y. 1967).

It therefore appears that petitioner's brief attempts to apply the right to counsel requirements at the hearing stage to the investigation stage. It is submitted that reliance upon those cases which require a right to counsel at a hearing is misplaced in that they do not apply at the investigatory stage of the proceedings. (Particularly here where there was no charge of a crime having been committed).

It is also clear that there is a distinction between an "investigation" and a "hearing" or "adjudication." A provision for "investigation" ordinarily is not a requirement of a "hearing" and constitutional rights in adjudicatory proceedings are inapplicable to the police investigation in the case at bar, because a one-sided investigation does not constitute a hearing. 2 Am.Jur.2d, Administrative Law, §114. The term "hearing" is appropriate to quasi-judicial proceedings, while "investigation" is appropriately used with regard to non-judicial functions of the administrative agency. It is therefore clear that "investigation" is non-adversary and contemplates procedure less formal and more flexible than applies to an administrative hearing.

Petitioner's contention that he was denied his right to counsel during his interview concerning allegations made against him is without merit during an investigatory non-adversary interview on a non-criminal matter. It is also clear that a subsequent disciplinary trial of a police officer is not a criminal proceeding, and the penalties involved would at most result in fines or dismissal from the police force. *Application of Delehanty*, 202 Misc. 22, *aff'd*, 280 App.Div. 542, *aff'd*, 304 N.Y. 725 (1952). Since the disciplinary matter is essentially civil in nature, and since the fruits of the disciplinary interrogation cannot be used in any subsequent criminal action, the rules applicable to having counsel present in criminal actions do not apply at the investigatory stage. There was no criminal charge contemplated or in fact made in this matter.

It should also be noted that petitioner's reliance upon *Miranda* v. *Arizona* 384 U.S. 436 is misplaced. The Court in *Kirby* v. *Illinois cited supra* stated:

> "It follows that the doctrine of *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 ALR 3d 974, has no applicability whatever to the issue before us; for the Miranda decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theroy that custodial *interrogation* is inherently coercive." at 37 L.Ed.2d 416, 417.

In any event the thrust of petitioner's case citations evolve around criminal actions and not administrative disciplinary proceedings.

POINT III

Petitioner, formerly a police officer in the Nassau County Police Department, may properly be made to account for his actions.

The law is clear that a municipal employer has a right to make inquiries of its emloyees as to matters effecting their fitness and suitability for public service, *Gardner* v. *Board of Public Works*, 341 U.S. 716 (1950). Additionally, petitioner's activities, whether on duty or off duty, are a legitimate subject for a disciplinary inquiry concerning a charge of conduct unbecoming an officer. *Parker* v. *Levy*, 417 U.S. 733, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974); *Fletcher* v. *United States*, 28 Ct. Cl. 173 (1893). In this regard, it should also be pointed out that §8-13.0 of the Nassau County Administrative Code provides that the Commissioner of Police shall have the power to discipline an officer guilty of immoral conduct.

Petitioner alleges that his participation in the interview phase of the internal investigation was improper and unconstitutional. Yet petitioner concedes that the constitutional right to privacy and the right to exercise 5th Amendment rights do not apply to administrative proceedings. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). Petitioner also ignores the fact that the United States Supreme Court has stated that a police officer must cooperate, and answer questions put to him during an official investigation. *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Mens Assoc.* v. *Commissioner of Sanitation of the City of New York*, 392 280 (1968).

It is contended by petitioner that the statement he gave to Chief Redican during the interview should be suppressed because he was not given proper Miranda warnings and that he was forced to incriminate himself. Petitioner's contentions are illogical. Assuming, *arguendo*, petitioner was subject to some criminal liability for his acts, then any statement he gave without the proper Miranda

warnings could not be used against him in any subsequent criminal action. In fact, the law holds that any answers given by a public employee pursuant to a legitimate investigation of his actions cannot be used against him in any subsequent criminal case. *Garrity* v. *New Jersey, supra; Kalkines* v. *United States* 473 F. 2d 1391 (Ct. Cl. 1973); *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7th Cir. 1973).

Judge Jasen, of the New York Court of Appeals, in his concurring opinion in *Cacchioli* v. *Hoberman*, 31 N.Y.2d 257, 338 N.Y.S.2d 865 (1972), stated:

"It should be noted that a threat by an employer to do what the employer has the right to do does not constitute fraud or duress. (*Bachorik* v. *Allied Control Co.*, 34 A.D. 2d 940, 942.) Under analogous circumstances involving the involuntary resignation of a corporate officer, the Appellate Division has held: '[The officer's] testimony further demonstrates that the events surrounding his resignation did not contain the elements of wrongful conduct necessary to establish the claims of duress and undue influence. What plaintiff relies upon is the fact that he was told that he would be involuntarily discharged, without severance pay and that this might be disclosed to prospective employers. This can neither be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud.

(*Bachorik* v. *Allied Control Co.*, 34 A.D.2d. at p. 942)". 31 N.Y.2d at 291-2."

In addition, the language in *Bachorik* v. *Allied Control Co.*, 34 A.D.2d 940 312 N.Y.S. 2d 272, (1st Dept. 1970), is relevant in that it establishes the flaws and weaknesses in petitioner's "coerced confession" argument. The Court stated, in *Bachorik*:

"His testimony further demonstrates that the events surrounding his resignation did not contain the elements of wrongful conduct necessary to establish the claims of duress and undue influence. What plaintiff relies upon is the fact that he was told that he would be involuntarily discharged, without severance pay and that this might be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud. (*Oleet* v. *Pennsylvania Exch. Bank*, 285 App. Div. 411.)" 34 A.D.2d at 942.

The petitioner was not deprived of any constitutional rights herein, inasmuch as what an employer had a right to do does not constitute coercion or duress, nor does it constitute any violation of his constitutional rights in the case at bar.

POINT IV

The Rules and Regulations of the Nassau County Police Department are not vague or ambiguous, and do not fail to indicate proscribed conduct so as to violate the due process clause of the Fourteenth Amendment to the United States Constitution.

A statute or rule which regulates human conduct is unconstitutional if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *Kraus & Bros.* v. *United States*, 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 (1946).

The rationale for this rule was explained by Justice Frankfurter:

> "Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. The requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of "due process of law"."*Winters* v. *New York*, 333 U.S. 507 523, 68 S.Ct. 665, 674, 92 L.Ed. 840 (1948) (dissenting opinion).

In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972), the Court stated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of [those] freedoms'. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone"...than if the boundaries of the forbidden areas were clearly marked."

However, a court examining an allegedly vague statute must not restrict its focus to the words of the statute only. The Supreme Court also noted in *Grayned* that a state court's narrowing interpretation of a state statute may supply the required specificity. The Court expanded on this proposition and relied on it in *Parker* v. *Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), which upheld articles 133 and 134 of the Uniform Code of Military Justice, despite their unspecific language, because of the specific content given those provisions by years of judicial gloss supplied "by the United States Court of Military Appeals or by other military authorities". The Court went on to reject the respondent's void-for-vagueness claim on the ground that, because the Articles applied without question to *his* activities, he had no standing "to challenge the vagueness of these Articles as they might be hypothetically applied to the conduct of others." The Court noted that this was not a case involving vagueness "'in the sense that no standard of conduct is specified at all,'" quoting from and distinguishing *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).*

* This, of course, does not mean that a person facing loss of a job does not have as strong a void-for-vagueness argument as one facing criminal prosecution. *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

However, *Parker* v. *Levy*, *supra*, controls disposition of the vagueness challenge here. In the first instance, this is not a First Amendment case. In addition, the vagueness attack should be rejected because the policies underlying the vagueness doctrine do not require its application here, and the Rules and Regulations of the Nassau County Police Department at issue here are not so vague that it specifies no standard at all.

It is also clear that the wording of the aforesaid regulations in question are not so vague that men of common intelligence like petitioner do not know its meaning. As the Supreme Court stated, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. at 575-577, 93 S.Ct. at 2897:

> "There might be quibbles about the meaning of [certain terms in the regulations,] but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offenses to which...[the provisions are] directed is plainly within [their] terms,...[and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.' *United States* v. *Harriss*, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954)."

It is therefore submitted that petitioner's vagueness challenge should be rejected, inasmuch as his conduct and his actions were properly the subject of a disciplinary action. In the *Matter of Morril*, 57 Misc. 2d 793 (1968), the New York Court stated:

> "A police officer plays a unique role in society. He is the guardian of the public safety and is set up as a model

to be emulated. He must at all times be free to exercise his judgment in performing his duties and can never act in a manner which would tend to destroy the public's confidence in his integrity. *Not only his official conduct, but the manner in which he conducts himself while not on duty reflects upon his integrity and upon his ability to perform his duties.*" (Emphasis supplied.)

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN F. O'SHAUGHNESSY
County Attorney of Nassau County
Attorney for Respondent
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

September, 1975

NATALE C. TEDONE,
Senior Deputy County Attorney

WILLIAM S. NORDEN,
Deputy County Attorney,
Of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

Plaintiff,

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK; DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK; THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, NEW YORK; RALPH G. CASO, THE COUNTY EXECUTIVE OF THE COUNTY OF NASSAU, NEW YORK; AND THE COUNTY OF NASSAU, NEW YORK,

Defendants.

AFFIDAVIT IN OPPOSITION

CIVIL ACTION NO. 76 C-1344

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

JAMES R. MOFFATT, being duly sworn, deposes and says:

That he is a member of the law firm of SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.

That this affidavit is submitted in opposition to the defendants' motion to dismiss the complaint on

all the grounds set forth in the moving papers, which said motion is returnable on its adjourned date on the 8th day of October, 1976 before the Honorable George C. Pratt.

That responding to the defendants' contentions chronologically, your deponent respectfully states:

AS TO SUBJECT MATTER JURISDICTION AND PARTY JURISDICTION.

That as to the contention that the plaintiff cannot sue the County, since the County is not a person, and the further contention that a necessary party defendant was not sued to wit: the Police Department of the County of Nassau, New York, that attached hereto and marked exhibit A is a copy of the plaintiff's amended complaint, which shall be served simultaneously with the service of these papers in opposition, which corrects these defects, if any. It is to be noted in this connection, that the defendants have not, as yet, answered the plaintiff's complaint but rather chose to make this motion.

Accordingly, it is respectfully submitted, that no leave is required to file and serve the attached amended complaint.

That as to subject matter jurisdiction, your deponent respectfully refers this Court to the cases cited under the plaintiff's answer and argument opposing that branch of the plaintiff's motion which seeks to dismiss the complaint on the basis of res judicata and or collateral estoppel. Insofar as the amended complaint is concerned, the plaintiff has added, in paragraph 2 thereof, an alleged violation of additional sections of the United States Code namely, Title 28, Section 1331, 2201 and 2202.

AS TO THE DEFENDANTS' ARGUMENT OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The defendants' contention that the denial of certiorari to the Supreme Court of the United States or the denial of certiorari or review by the Court of Appeals of the State of New York is somehow dispositive of the issue of the defendants' liability in this

action, is totally unfounded and without any merit whatsoever.[1]

[1]Rule 25 Supreme Court Rules of the United States of America, titled "Order granting or denying certiorari", Title 28, USCA.

The defendants' contention of res judicata is unfounded in that, a denial of certiorari by the United States Supreme Court does not constitute an expression on the merits, nor does it project any implication regarding the views of the Supreme Court, for it only means that the Court refuses to review the matter. (United States v. Shubert, 348 US 222, 99 L. Ed. 279; State of Maryland v. Baltimore Radio Show, 338 US 912, 94 L. Ed. 562; Application of Sullivan, D.C. Utah 1954, 126 F. Supp. 564, reversed on other grounds, 227 F. 2d 511, certiorari denied 350 US 973, 100 L. Ed. 841).

> "The Supreme Court has repeatedly stated that a denial of certiorari is not an adjudication on the merits and has no res judicate effect." (Brown v. Allen, 344 US 443, 457-458, 97 L. Ed. 469, as cited in Javits v. Stevens, 382 F. Supp. 131, 142 (1971)).
>
> Nor does a denial by the New York Court of Appeals - the New York Court of Appeals has held that denial of leave to appeal is discretionary and is not the equivalent of a decision on the merits. (Matter of Marchant v. Meade-Morrison Mfg. Co., 252 NY 284, 297).

The Court's attention is respectfully directed to the landmark case of John F. Lombard against the Board of Education of the City of New York, and John A. Murphy.[2] That attached hereto for the convenience of the Court and marked exhibits B and C respectively, are said decisions in their entirety. A cursory reading of the original complaint and the amended complaint at bar reveal that as to the issue of subject matter jurisdiction and res judicata, the plaintiff's allegations of the deprivation of his civil rights and constitutional rights as afforded by the Federal statutes in question are much more substantial then the deprivation of civil rights as provided by the Federal statutes in the Lombard case. It is to be noted that insofar as State and Federal procedure is concerned that the plaintiff at bar, using State remedy, via an Article 78 proceeding, the

[2] 502 F. 2d 631, 1974; United States Court of Appeals, 2nd Cir., and the said case as remanded, 407 F. Supp. 1166 (1976).

plaintiff appealed to the Appellate Division, thereafter sought leave to appeal to the Court of Appeals, thereafter sought leave to reargue the denial by the Court of Appeals and thereafter duly moved for a Petition for a Writ of Certiorari to the Supreme Court of the United States of America; and in the Lombard case, the plaintiff in the State Courts also proceeded by an Article 78 proceeding, appealed to the Appellate Division, thereafter sought leave to the Court of Appeals but did not seek to obtain a Petition for a Writ of Certiorari to the Supreme Court of the United States of America.

Accordingly, it is respectfully submitted that the Lombard case as cited below is completely dispositive of the defendants' contentions as to the issue of subject matter jurisdiction and the issue of res judicata a collateral estoppel.

Your deponent has endeavored to obtain some history of the purpose of the Statutes which are the predicate of the jurisdiction of this Court

as enunciated in Mitchum v. Foster, 407 US 225, 242.[3]

WHEREFORE, your deponent respectfully prays defendants' motion and all the relief requested in the moving papers be in all respects denied,

[3] "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' Ex parte Virginia, 100 US, at 346, 25 L Ed at 679."
The United States Supreme Court in McNeese v. Board of Education, 373 US 668, 10 L Ed. 2d 622, concerning Section 1983 said:
". . .The purposes were several fold - to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy, where the state remedy, though adequate in theory, was not available in practice', and to provide a remedy in the federal courts supplementary to any remedy any State might have."

together with such other, further and different relief as to the Court may seem just and proper.

James R. Moffatt

JAMES R. MOFFATT

Sworn to before me this
7th day of October, 1976.

Linda Sue Colyer

LINDA SUE COLYER
NOTARY PUBLIC State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires [illegible] 30, 77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL A. GRIPPE,

Plaintiff-Appellant,

- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER OF POLICE OF THE COUNTY OF NASSAU, NEW YORK, DANIEL P. GUIDO, THE SUCCESSOR AND PRESENT COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, AND THE COUNTY OF NASSAU, NEW YORK,

Defendants.

----------X

CIVIL ACTION
76 C 1344

NOTICE OF APPEAL

Notice is hereby given that Daniel A. Grippe hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum and Order granting the defendants' motion to dismiss the plaintiff's Complaint. Said order having been filed on October 21, 1976.

Dated: October 29, 1976
Mineola, New York

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